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[redacted]

No. 778.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

ROBERT L. GREENE, AUDITOR OF PUBLIC ACCOUNTS, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT OF THE STATE OF KENTUCKY, ET AL.

No. 779.

ROBERT L. GREENE, AUDITOR OF PUBLIC ACCOUNTS, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT OF THE STATE OF KENTUCKY, ET AL., APPELLANTS,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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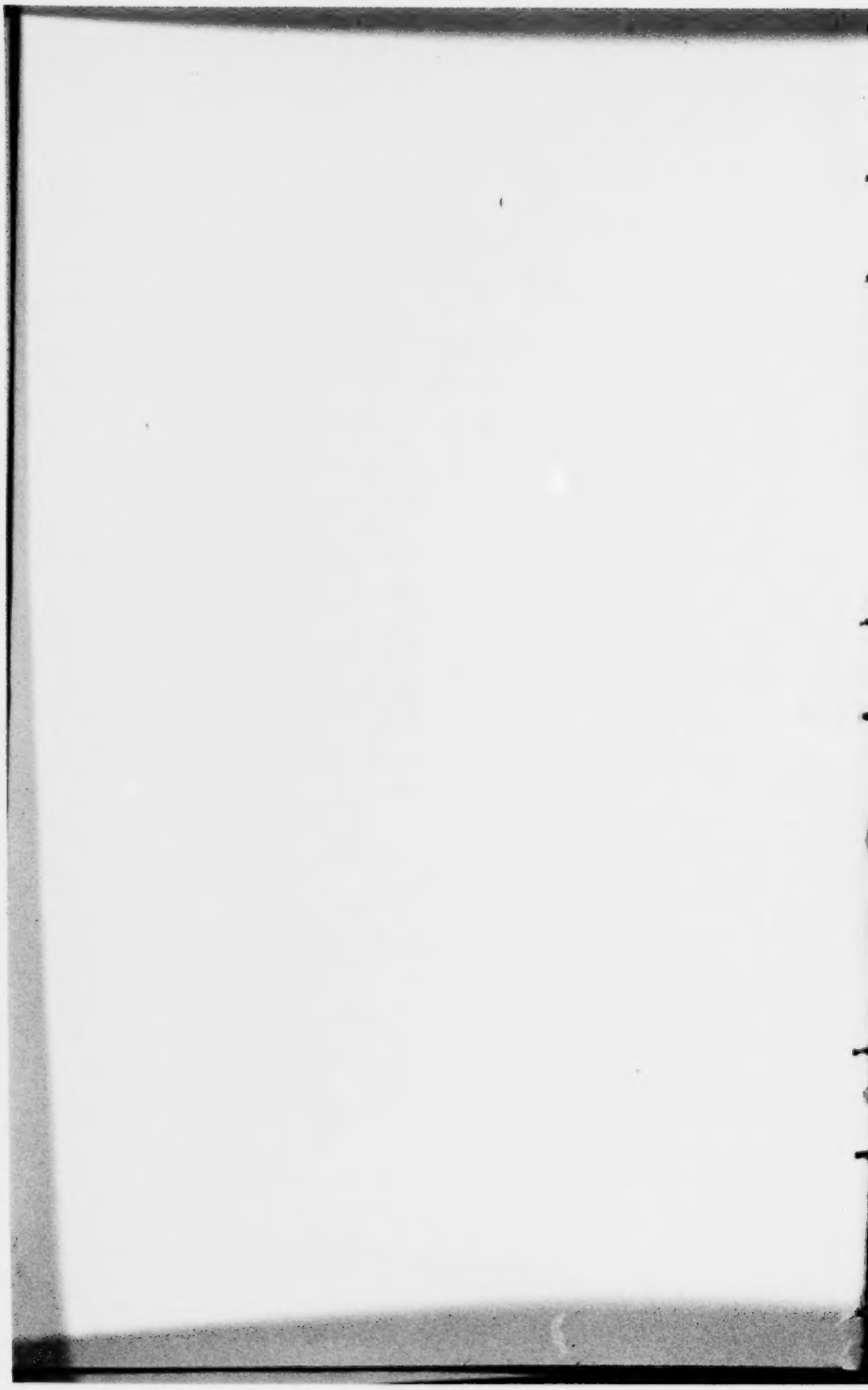

(25,608)
(25,609)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 778.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

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1 United States District Court, Eastern District of Kentucky, at Frankfort.

768. In Equity.

LOUISVILLE & NASHVILLE R. R. CO.
vs.
ROBERT L. GREENE, Auditor, et al.

For satisfactory reasons appearing to the Court the time for filing the record in this case in the Supreme Court of the United States, pursuant to the appeal and cross appeal sued out is extended until December 1, 1916.

A. M. J. COCHRAN,
U. S. Judge.

October 6, 1916.

2 *Citation.*

UNITED STATES OF AMERICA:

The President of the United States to Robert L. Greene, Auditor of Public Accounts; Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, of the State of Kentucky, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky; Robert L. Greene, Auditor of Public Accounts of the State of Kentucky; Thomas M. Jones, Assistant Auditor of Public Accounts of the State of Kentucky; M. M. Logan, Attorney General of the State of Kentucky; Charles H. Morris, First Assistant Attorney General of the State of Kentucky; O. S. Hogan, Second Assistant Attorney General of the State of Kentucky; D. O. Myatt, Third Assistant Attorney General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, State of Kentucky, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the City of Washington within thirty (30) days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States for the Eastern District of Kentucky and filed in the Clerk's office of said Court on the 15th day of September, A. D. 1916, in the cause wherein the Louisville & Nashville Railroad Company is appellant and you are appellees, to show cause why, if any, the decree rendered against said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 15th day of September, in the year of our Lord

one thousand nine hundred and sixteen, and of the independence of the United States of America the one hundred and forty-first.

A. M. J. COCHRAN,
United States District Judge.

Service of the foregoing citation is hereby accepted, this 26th day of September, 1916.

M. M. LOGAN,
JOHN L. RICH,
Attorneys for Appellees.

Filed Sept. 26, 1916.

[Seal Eastern K't'y Dist. Court, United States of America.]
J. W. MENZIES, *Clerk*,
By C. N. WIARD, *D. C.*

3 768.

Citation on Cross-Appeal.

UNITED STATES OF AMERICA:

The President of the United States to Louisville & Nashville Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof and pursuant to a cross-appeal this day granted by the United States District Court for the Sixth Circuit and Eastern District of Kentucky, wherein you are plaintiff and now appellee, and Robert L. Greene, Sherman Goodpaster, James P. Lewis, Thomas M. Jones, M. M. Logan, Charles H. Morris, O. S. Hogan, D. O. Myatt, Victor Bradley and Wiley C. Marshall are defendants and now cross-appellants, to show cause if any there be why the decree rendered against the said cross-appellants as aforesaid should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 5th day of October, 1916, and of the Independence of the United States the one hundred and fortieth.

[Seal Eastern K't'y Dist. Court, United States of America.]

A. M. J. COCHRAN,
Judge of the District Court of the United States for the Sixth Circuit and the Eastern District of Kentucky.

A copy of the within citation received this the 25th day of October, 1916.

H. L. STONE,
Counsel for Plaintiff.

Filed Oct. 25, 1916. J. W. Menzies, U. S. Clerk.

4 Record of the Proceedings of the District Court of the United States for the Eastern District of Kentucky in the Cause and Matter Hereinafter Stated, and the Same being Disposed of at a Regular Term of said Court, Begun and Held in the City of Frankfort, on the Second Monday in March, 1916, Being the 13th Day of said Month, and the Final Decree in said Cause Being Entered on the 13th day of June, A. D. 1916.

Present: Hon. A. M. J. Cochran, Judge.

5 Louisville & Nashville Railroad Company, Plaintiff,

v.

Robert L. Greene, Auditor of Public Accounts; Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State of the State of Kentucky, Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky; Robert L. Greene, Auditor of Public Accounts of the State of Kentucky; Thomas M. Jones, Assistant Auditor of Public Accounts of the State of Kentucky; M. M. Logan, Attorney General of the State of Kentucky; Charles H. Morris, First Assistant Attorney General of the State of Kentucky; O. S. Hogan, Second Assistant Attorney General of the State of Kentucky; D. O. Myatt, Third Assistant Attorney General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, State of Kentucky, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky, Defendants.

Said action was commenced on the 23rd day of January, A. D. 1914, and proceeded to final disposition at the term and day above written, and during the progress thereof pleadings and papers were filed, process issued and returned, and orders of court were made and entered in the order and on the dates hereinafter stated, to-wit:

6 On January 23, 1914, complainant filed its Bill of Complaint herein, same being as follows, viz:

In the District Court of the United States in and for the Eastern District of Kentucky.

In Equity.

No. 768.

Louisville & Nashville Railroad Company, Plaintiff,

versus

H. M. Bosworth, Thomas S. Rhea, and C. F. Crecelius, Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky; H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky; G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky; James Garnett, Attorney General of the State of Kentucky; C. H. Morris, First As-

sistant Attorney General of the State of Kentucky; M. M. Logan, Second Assistant Attorney General of the State of Kentucky; O. S. Hogan, Third Assistant Attorney General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, and W. C. Marshall, County Attorney of Franklin County, of the State of Kentucky, Defendants.

7 To the Honorable the Judges of the District Court of the United States, for the Eastern District of Kentucky:

The Louisville & Nashville Railroad Company, a corporation duly created, organized, and existing under the laws of the State of Kentucky, and a citizen of the State of Kentucky, residing at Louisville, Ky., in the Western District of Kentucky, brings this its bill of complaint against H. M. Bosworth, a citizen of the State of Kentucky, residing in Fayette County in the Eastern District of Kentucky; Thomas S. Rhea, a citizen of the State of Kentucky, residing at Russellville, Ky., in Logan County, in the Western District of Kentucky; C. F. Crecelius, a citizen of the State of Kentucky, residing at Falmouth, Ky., in Pendleton County, in the Eastern District of Kentucky, and temporarily residing at Frankfort, Ky., in Franklin County, in the Eastern District of Kentucky; H. M. Bosworth, Thomas S. Rhea, and C. F. Crecelius, as constituting the Board of Valuation and Assessment of the State of Kentucky, whose residence and office as constituting said Board of Valuation and Assessment are at Frankfort, Ky., in the Eastern District of Kentucky; H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, a citizen of the State of Kentucky, whose office and residence as said Auditor of Public Accounts are fixed by law at the seat of government of the State of Kentucky, at Frankfort, Ky., in the Eastern District of Kentucky; G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, a citizen of the State of Kentucky, whose office and residence as said Assistant Auditor of Public Ac-

8 counts are fixed by law at the seat of government of the State of Kentucky, at Frankfort, Ky., in the Eastern District of Kentucky; James Garnett, Attorney-General of the State of Kentucky, a citizen of the State of Kentucky, residing at Columbia, in Adair County, in the Western District of Kentucky; C. H. Morris, First Assistant Attorney-General of the State of Kentucky, a citizen of the State of Kentucky, residing at Frankfort, Ky., in Franklin County, in the Eastern District of Kentucky; M. M. Logan, Second Assistant Attorney-General of the State of Kentucky, a citizen of the State of Kentucky, residing in Edmonson County, in the Western District of Kentucky; O. S. Hogan, Third Assistant Attorney-General of the State of Kentucky, a citizen of the State of Kentucky, residing in Grant County, in the Eastern District of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court of the State of Kentucky, a citizen of the State of Kentucky, residing at Georgetown, in Scott County, in the Eastern District of Kentucky; and W. C. Marshall, County Attorney of Franklin County, of the State of Kentucky, a citizen of the State of Kentucky,

residing in the Eastern District of Kentucky. And thereupon plaintiff complains and says:

I.

Plaintiff, Louisville & Nashville Railroad Company, was at all times hereinafter mentioned, and is, a corporation duly created, organized, and existing under the laws of the State of Kentucky, and is
9 a citizen of the State of Kentucky, and it did at all times hereinafter mentioned, and does now, operate, own, lease and control lines of railroad and other property in the States of Ohio, Indiana, Illinois, Missouri, Kentucky, Tennessee, Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, and Louisiana. The total mileage of roads so operated, owned, leased, or controlled by plaintiff as of June 30, 1912, in the State of Kentucky and elsewhere, was 7,907.83 miles, and the total mileage of roads operated, owned, leased, or controlled by plaintiff as of June 30, 1912, was distributed between mileage in the State of Kentucky and outside of the State of Kentucky, by separate lines, divisions, and branches, as is shown by the following statement:

Lines Owned and Operated.

Owned:	Total.	In Kentucky.	Outside of Kentucky.
Main Stem	185.80	139.91	45.89
Chesapeake & Nashville Branch	46.82	10.08	36.74
Nashville, Florence & Sheffield Division	107.56	.....	107.56
Montgomery & Prattville Branch	10.36	.....	10.36
Birmingham Mineral Division	248.84	.....	248.84
Alabama Mineral Division	131.16	.....	131.16
Mobile & Montgomery Division	177.67	.....	177.67
Alabama & Florida Division	126.66	.....	126.66
New Orleans & Mobile Division	141.17	.....	141.17
Bardstown & Springfield Branch	37.44	37.44	.....
Lebanon Branch	107.28	107.28	.....
Greensburg Branch	30.85	30.85	.....
Knoxville Division	242.80	47.08	195.72
Atlanta Division—New Line	89.38	.....	89.38
Atlanta Division—Old Line	166.18	.....	166.18
Cumberland Valley Division	144.48	72.17	72.31
Middlesborough Railroad	17.12	14.15	2.97
Memphis Line	261.59	46.46	215.13
Clarksville & Princeton Branch	32.00	23.17	8.83
Clarksville Mineral Branch	36.90	.....	36.90
10 Henderson Division	158.45	110.49	47.96
Morganfield Branch (part of)	16.10	16.10	.....
Southern Alabama Division	127.64	.....	127.64
Myrtlewood Branch	60.25	.....	60.25
Yellow River Branch	26.40	.....	26.40
Pensacola Division	44.64	.....	44.64
Pensacola & Atlantic Division	160.47	.....	160.47
Cincinnati Division	118.36	118.00	.36
Lexington Branch	75.51	75.51	.....
Shelby Branch	18.58	18.58	.....
Kentucky Division	220.39	220.39	.....
Louisville & Atlantic Division	103.06	103.06	.....
Bloomfield Branch	26.72	26.72	.....
Total Lines Owned	3,498.63	1,217.44	2,281.19

Lines Operated, but Not Owned.

	Total.	In Kentucky.	Outside of Kentucky.
Operated as Owner of Entire Capital Stock:			
Southeast & St. Louis Railway	207.70	.....	207.70
Morganfield & Atlanta Railroad	25.33	25.33	.....
Madisonville, Hartford & Eastern Railroad	55.49	55.49	.....
Maysville & Lexington Railroad, Northern Division	49.48	49.48	.....
Maysville & Lexington Railroad Southern Division	17.86	17.86	.....
Owensboro & Nashville Railway	83.46	83.46	.....
Bay Minette & Ft. Morgan Railroad	36.52	.....	36.52
Long Branch Coal Railroad	7.99	.....	7.99
Stout's Mountain Railroad	5.91	.....	5.91
Pontchartrain Railroad	4.96	.....	4.96
Pine Mountain Railroad—West	21.09	21.09	.....
Pine Mountain Railroad—East	2.15	2.15	.....
Kentucky Highlands Railroad—Millville to Versailles	9.42	9.42	.....
Swan Creek Railway	17.10	.....	17.10
Wasioto & Black Mountain Railroad	70.05	70.05	.....
Harriman, Knoxville & Eastern Railroad	17.54	.....	17.54
Total Operated as Owner of Entire Capital Stock	632.05	334.33	297.72
Operated under Lease:			
Nashville & Decatur Railroad	118.97	.....	118.97
11 Operated under Trackage Arrangements:			
Main Stem—Second Division:			
L. & N. Terminal Co. Tracks	.59	.....	.59
Nashville & Decatur Railroad:			
L. & N. Terminal Company Tracks	.48	.....	.48
M. & C. Junction to Decatur (Southern Railway)	1.71	.....	1.71
Nashville, Florence & Sheffield Division:			
Furnace Jct. to Sheffield Jct., Ala. (Southern Railway)	2.90	.....	2.90
Birmingham Mineral Division:			
Gurnee Jct. to Blocton, Ala. (Southern Railway)	14.30	.....	14.30
Aden to Masena, Ala. (Southern R'y)	5.60	.....	5.60
Seymour, Ala., to End of Track (Southern Railway)	3.91	.....	3.91
Ardela to Hansell Ala. (Southern Railway)	2.90	.....	2.90
Blocton Jct. to Blocton, Ala (W. & B. R'y)	7.73	.....	7.73
Alabama Mineral Division:			
Moragne to Attalla, Ala. (N., C. & St. L. R'y)	2.01	.....	2.01
Track at Gadsden Ala. (N., C. & St. L. R'y)	.74	.....	.74
Knoxville Division:			
Hyde to Fonde, Ky. (Southern R'y)	11.21	2.09	9.12
Atlanta Division—New Line:			
Junta to Atlanta, Ga. (N., C. & St. L. R'y)	48.09	.....	48.09
Cumberland Valley Division:			
Virginia & Southwestern Tracks	15.65	.....	15.65
Norfolk & Western Tracks at Norton, Va.	.77	.....	.77

Operated under Trackage Arrangements—Continued:	Total.	In Kentucky.	Outside of Kentucky.
Straight Creek Coal & Coke Company's Track	3.89	3.89	.....
Atlanta & Birmingham Air Line Railway	77.40	.....	77.40
Morganfield Branch:			
Providence Coal Company's Track	.30	.30	.....
Southern Alabama Division:			
Western R'y of Ala. Track at Selma	.51	.....	.51
Myrtlewood Branch:			
Western Railway of Alabama Track at Selma	.36	.....	.36
Pensacola & Atlanta Division:			
A. C. L. R'y Track at River Junction	1.04	.....	1.04
12 Cincinnati Division:			
P., C., C. & St. L. R'y Track at Cincinnati, O.	.44	.....	.44
Louisville & Interurban R'y Track	7.70	7.70	.....
Lexington Branch:			
C. & O. Track at Lexington	.20	.20	.....
Lexington Union Station Co. Track	.22	.22	.....
Kentucky Division:			
C. & C. Bridge Track	2.18	1.58	.60
St. Louis Division:			
B. & O. R'y Track at East St. Louis, Ill.	.11	.....	.11
Terminal Railroad Association of St. Louis Tracks	3.84	.....	3.84
Owensboro & Nashville Railway:			
Track at Owensboro Ky. (L., H. & St. L. R'y)	.26	.26	.....
Total Operated under Trackage Arrangements	217.04	16.24	200.80
Lines Operated for Account of Owners:			
Elkton & Guthrie Railroad	10.92	10.92	.....
Glasgow Railway	10.50	10.50	.....
South & North Alabama Railroad	200.46	.....	200.46
Total Lines Operated for Account of Owners	221.88	21.42	200.46
Line Owned—Leased to N., C. & St. L. R'y, Operated under Trackage Arrangements:			
Memphis Line—Aulon to South Memphis	5.46	.....	5.46
Line Operated under Trackage Arrangements, Entire Capital Stock Owned—Property Operated under Its Own Organization:			
Louisville & Atlantic Division:			
Kentucky Highlands Railroad—Millville to Cliffside	6.46	6.46	.....

13 Lines Operated under their Separate Organizations in which Plaintiff Owns a Majority of the Capital Stock or is Interested as Joint Owner or Lessee:

	Total.	In Kentucky.	Outside of Kentucky.
Nashville, Chattanooga & St. Louis Railway	925.01	8.23	916.78
Central Transfer Railway & Storage Co.	.67	.67	.....
Georgia Railroad and Dependencies	571.00	.....	571.00
Chicago, Indianapolis & Louisville R'y.	616.60	.....	616.60
Louisville, Henderson & St. Louis R'y	181.44	181.44	.....
Lexington & Eastern Railway	96.11	96.11	.....
New Orleans, Mobile & Chicago Railroad	547.06	.....	547.06
Total	2,937.89	286.45	2,651.44
Lines Owned by Plaintiff, but Operated by Other Companies:			
Paducah & Memphis Division	248.74	49.40	199.34
Clarksville & Princeton Branch—Gracey to Princeton, Ky.	20.71	20.71	.....
Total	269.45	70.11	199.34
Resume:			
Owned and Operated	3,498.63	1,217.44	2,281.19
Operated as Owner of Entire Capital Stock.	632.05	334.33	297.72
Operated under Lease	118.97	.....	118.97
Operated under Trackage Arrangements	217.04	16.24	200.80
Owned, Leased, Operated under Trackage Arrangements	5.46	.....	5.46
Owner of Entire Capital Stock, Property Operated Separately, Operated by Plaintiff under Trackage Arrangements	6.46	6.46	.....
	4,478.61	1,574.47	2,904.14
Operated for Account of Owners	221.88	21.42	200.46
Operated under Separate Organizations	2,937.89	286.45	2,651.44
Owned, but Operated by Other Companies	269.45	70.11	199.34
Total	7,907.83	1,952.45	5,955.38

14 The total length of lines operated, owned, leased, or controlled, within the State of Kentucky was, as of June 30, 1912..... 1,952.45 miles and the ratio or proportion which the length of the lines operated, owned, leased, or controlled, in the State of Kentucky bore to the total length of lines operated, owned, leased, or controlled in the State of Kentucky and elsewhere was..... 24.6901%

II.

Plaintiff has its principal operating office and resides in the city of Louisville, in Jefferson County, Kentucky, in the Western District of Kentucky.

III.

The defendant, H. M. Bosworth, is a citizen of the State of Kentucky, residing in Fayette County, in the Eastern District of Ken-

tucky; the defendant, Thomas S. Rhea, is a citizen of the State of Kentucky, residing at Russellville, in Logan County, in the Western District of Kentucky; the defendant, C. F. Crecelius, is a citizen of the State of Kentucky, residing at Falmouth, in Pendleton County, in the Eastern District of Kentucky, and temporarily residing at Frankfort, in Franklin County, in the Eastern District of Kentucky.

The defendant, H. M. Bosworth, is the Auditor of Public Accounts of the State of Kentucky, and ex officio Chairman of the
15 Board of Valuation and Assessment of the State of Kentucky, hereinafter more particularly described; the defendant, Thomas S. Rhea, is the Treasurer of the State of Kentucky, and a member of the Board of Valuation and Assessment; and the defendant, C. F. Crecelius, is the Secretary of State of the State of Kentucky, and also a member of the Board of Valuation and Assessment. All of said defendants, H. M. Bosworth, Thomas S. Rhea, and C. F. Crecelius, were duly elected to their respective offices and have qualified as provided by law. The said defendants, H. M. Bosworth, Thomas S. Rhea, and C. F. Crecelius together constitute the Board of Valuation and Assessment organized under the laws of the State of Kentucky, as will be hereinafter more particularly set out. The defendant, G. B. Likens, is Assistant Auditor of Public Accounts of the State of Kentucky, and was duly appointed to this office and has qualified as provided by law. The Auditor of Public Accounts of the State of Kentucky, the Treasurer of the State of Kentucky, the Secretary of State of the State of Kentucky, and the Assistant Auditor of Public Accounts of the State of Kentucky, are required by law to reside and keep their offices at the seat of government of the State of Kentucky, which is at Frankfort, Ky., in Franklin County, in the Eastern District of Kentucky.

The defendant, James Garnett, is the Attorney-General of the State of Kentucky, and is a citizen of the State of Kentucky, residing at Columbia, in Adair County, in the Western District of Kentucky; the defendant, C. H. Morris, is First Assistant At-
16 torney-General of the State of Kentucky, and is a citizen of the State of Kentucky, residing at Frankfort, Ky., in Franklin County, in the Eastern District of Kentucky; the defendant, M. M. Logan, is Second Assistant Attorney-General of the State of Kentucky, and is a citizen of the State of Kentucky, residing in Edmonson County, in the Western District of Kentucky; the defendant, O. S. Hogan, is Third Assistant Attorney-General of the State of Kentucky, and is a citizen of the State of Kentucky, residing in Grant County, in the Eastern District of Kentucky; and the defendant, Victor A. Bradley, is Commonwealth's Attorney for the Franklin Circuit Court of the State of Kentucky, and is a citizen of the State of Kentucky, residing at Georgetown, in Scott County, in the Eastern District of Kentucky. The defendant, James Garnett, was duly elected to the office of Attorney-General of the State of Kentucky and has qualified as provided by law. The defendants, C. H. Morris, M. M. Logan and O. S. Hogan, were duly appointed to their respective offices and have qualified as provided by law. The

defendant, Victor A. Bradley, was duly elected Commonwealth's Attorney and has qualified as provided by law.

The defendant, W. C. Marshall, is the duly elected County Attorney of Franklin County, of the State of Kentucky, and is a citizen of the State of Kentucky, residing in the Eastern District of Kentucky, and has qualified as provided by law.

17 IV.

It is provided by Section 142 of the Kentucky Statutes that if the Auditor be absent, or for any cause is rendered incapable of performing the duties of his office, or if a vacancy in the office occurs, the Assistant Auditor shall perform the duties of Auditor until the necessity therefor has ceased to exist; and defendant, G. B. Likens, is joined as a party defendant in this suit as Assistant Auditor of Public Accounts of the State of Kentucky for the purpose of preventing and enjoining him from doing any of those acts or things which it is sought to prevent and enjoin defendant, H. M. Bosworth, as Auditor of Public Accounts of the State of Kentucky, from doing.

V.

It is provided by an Act of the General Assembly of the Commonwealth of Kentucky approved March 20, 1908, which repeals and is a substitute for Sections 112, 113, 114 and 115 of the Kentucky Statutes as they previously existed, that the Attorney-General and his assistants shall attend to all litigation and business in or out of the State required of him or them under this act or other existing law or laws thereinafter enacted, and also any litigation or business that any State officer may have in connection with or growing out of his official duty; and the defendants, C. H. Morris, M. M. Logan and O. S. Hogan, are joined as parties defendant in this suit as

18 First Assistant Attorney-General of the State of Kentucky, as Second Assistant Attorney-General of the State of Kentucky, and as Third Assistant Attorney-General of the State of Kentucky, respectively, for the purpose of preventing and enjoining them from doing any of those acts or things which it is sought to prevent and enjoin defendant, James Garnett, as Attorney-General of the State of Kentucky, from doing.

VI.

This suit is a suit in equity and arises under the Constitution and laws of the United States, as will hereinafter more particularly appear; and the amount in controversy in this case, without interest and costs, as will hereafter be more specifically shown, far exceeds the sum and value of three thousand dollars. Among other things, this suit is brought to redress and prevent the deprivation under color of several statutes of the State of Kentucky of certain rights and immunities secured to plaintiff by the Constitution of the United States—that is, the right to have and enjoy its property without being

deprived thereof without due process of law, and without being denied the equal protection of the laws. And this suit involves the question as to whether or not certain assessments and taxation sought to be made and imposed by defendants with respect to the franchise of plaintiff interfere with, burden, obstruct and regulate commerce with foreign nations and among the several States.

19 VII.

It is provided by Section 172 of the present Constitution of the Commonwealth of Kentucky that all property not exempted from taxation by the Constitution shall be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale; and it is provided by Section 174 of said Constitution that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value unless exempted by the Constitution, and that all corporate property shall pay the same rate of taxation paid by individual property; and it is provided by Section 171 of said Constitution that taxation shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and that all taxes shall be levied and collected by general laws. The assessing and taxing authorities of the State of Kentucky, including defendants, systematically, habitually, intentionally and designedly assess and have assessed the property of individuals and other corporations for taxation in the State of Kentucky at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and defendants have intentionally and fraudulently assessed the property of plaintiff, and particularly its franchise, at more than its fair cash value estimated at the price it would bring at a fair voluntary sale, with the result that if taxation is enforced upon the assessment made by defendants plaintiff will be compelled to pay on its property a higher rate of taxa-
20 tion than is paid by individual property, and a higher rate of taxation than is paid by other corporate property in the State of Kentucky, and taxes will not be uniform or substantially uniform within the State, and will not be uniform or substantially uniform within territorial limits of the counties, cities, towns or taxing districts in which plaintiff is taxed in the State of Kentucky; and plaintiff will be denied the equal protection of the laws guaranteed to it by the Constitution of the United States, particularly by Section 1, Article 14, of the Amendments to said Constitution. The taxing and assessing authorities of the State of Kentucky, including defendants, habitually, generally, intentionally and systematically interpret the laws of the State of Kentucky which require that property shall be assessed at its fair cash value as meaning, with respect to the property of individuals or natural persons, that property shall be assessed at an amount different and less than its actual value, and they assess the property of individuals and natural persons accordingly; but defendants have assessed the property of plaintiff, particularly its franchise, at more than its fair cash value as such phrase is generally, habitually, intentionally and systematically in-

terpreted by the assessing authorities of the State of Kentucky, including defendants, and at more than its actual fair cash value, and thereby deprive plaintiff of the equal protection of the laws of the State of Kentucky.

21 VIII.

Plaintiff further shows that the Legislature of the State of Kentucky has recognized that property in Kentucky is not generally assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale, or at its actual value, and provision is made by Kentucky Statutes, enacted since the adoption of the present Constitution of the Commonwealth of Kentucky, for a State Board of Equalization, which annually meets and which has annually met for a considerable period of time at the Capitol of the State *of* Frankfort for the purpose of equalizing assessments of all real and personal property of the individual citizens of the State and of corporation-, except those whose property is assessed by the State Board of Valuation and Assessment, and except railroads, the assessment or valuation of whose tangible property is corrected and equalized by the Railroad Commission of the State. Said Board of Equalization regularly meets and undertakes to carry out the provisions of the act under which it is constituted. By said act the Board of Equalization is constituted and the method of the selection of its members and their term of office are provided. The Auditor of Public Accounts of the State is ex officio a member of the State Board of Equalization. It is provided in said law that said Board shall assemble at the State Capitol on the 10th day of February annually to perform the duties imposed upon it by the provisions of said act, but in case the Auditor has not by that day received
22 sufficient returns of assessment and tabulated statements, as provided for in said act, from the various county clerks of the Commonwealth, the said officer may, at his discretion, call the Board to meet at some later day. It is further provided that in all cases of partial returns from any county the Board of Equalization may estimate the valuation in the towns or districts from which returns have not been received, and may equalize the total valuation as in other cases; and in all cases of failure on the part of any county clerk to furnish the returns of the assessment of his county to the Auditor prior to or during the meeting of the Board of Equalization in each year said Board may, by order, authorizing the Auditor to equalize the assessment of such county when the full returns have been received by him.

It is further provided by said act that the clerks of the various county courts of the Commonwealth are required to make out an annual tabulated statement of all sales of real estate as shown by the deed books in their respective counties on suitable blanks which the Auditor is, by said act, required to furnish said clerks, and said clerks are required to make and file said tabulated statements on or before the 1s day of January in each year, town lots being kept separate from other real estate. Said tabulated statements shall be for one

year immediately preceding the 1st day of September, and shall contain a list of all sales of real estate, town lots being kept separate, as aforesaid, the price paid, the terms and conditions, the number of acres, and the assessed value of same, for the said year. Said
23 tabulated statements shall only include sales where absolute fee simple title is given, and if only a part of a tract of land or town lot is sold shall give a short description of same and state what proportion the same may be of such tract of land or town lot. The said tabulated statements shall be sworn to by the said clerk before some person competent to take oaths as a full and complete statement of said facts for the period of one year previous to the 1st day of September. Said statements shall also be signed and sworn to by the county attorney and the county judge, and in their affidavits they shall state that they have examined the recorded and unrecorded conveyances filed for said twelve months preceding Sptember 1st last passed, and each and every such conveyance (except those based on love and affection) with the consideration therefor correctly stated as (is) shown in said statement, and that the assessed values are correctly given in said statement. Said board shall have the authority to obtain and use any other evidence as to values, and whether or not the property conveyed has been assessed at a greater per centum of its actual value than in cases where property has not been conveyed. Said tabulated list shall be made out and sent to the Auditor of Public Accounts for the use of the State Board of Equalization.

It is further provided by said act as follows:

"Section 4274. (7) Percentage of values fixed — notice to county judges—hearing witnesses. The said Board of Equalization shall fix the percentages of assessed value of real property at its fair cash value, and all counties whose average lists of real property fall below such value shall be raised to the same, and all those counties whose
24 average lists are above the same shall be lowered to said cash value. The secretary to the State Board of Equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the Board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said Board in reference to the action of the Board. The Board shall then revise their action or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their rights to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts.

"Section 4275. (8) Personal property. The said Board of Equalization shall also equalize the personal property of every county in this Commonwealth by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected, and fractions of one-half or over shall be counted as one.

"Section 4276. (9) Assessment—when to remain as fixed by su-

pervisors. In the event that there has not been as many as five sales of land in any county in any one year next preceding September the first, then the assessments of real estate and personal property for that county shall remain as fixed by the County Board of Supervisors, and the same rule shall apply to town lots.

"Section 4277. (10) Percentage of values—how ascertained. Said Board shall find the average percentage of assessed value to cash value of land and town lots in any one county by taking in
25 said tabulated statement the aggregate assessed value of all tracts of land and town lots, town lots being kept separate, and calculating what percentage said aggregate assessed values are of the cash value of the same, time payments being reduced to cash value on the basis of six per centum discount.

"Section 4278. (11) Results reported to Auditor. When the Board shall have completed its equalization of assessments for any one year the chairman and secretary shall certify to the Auditor the rates finally determined by the said Board to be added to or deducted from the listed or assessed valuation of lands and town lots and personal property in the several counties, and the amounts assessed by said Board, and it shall be the duty of the Auditor, under his seal of office, to report the action of the Board to the several sheriffs immediately after the adjournment of said Board.

"Section 4279. (12) Proceedings to be published. The report of the proceedings of said Board of Equalization shall be published annually in pamphlet form, and one thousand copies thereof printed, of which number each member shall be entitled to fifty copies, and the Auditor to two hundred, and the remainder thereof shall be distributed by the Secretary of State to the several counties in proportion. Said distribution shall be by mail or express, immediately upon the receipt of said report from the public printer, the cost of such distribution to be paid for by the Treasurer of the State out of any money in the treasury not otherwise appropriated.

"Sections 4280. (13) Secretary's duties—fractions rejected. All rates of taxes as herein provided for shall be extended by the secretary on the assessed valuation of property as equalized and assessed by the State board of Equalization. Said secretary shall extend the rates of addition or deduction ordered by the State Board of Equalization in columns provided for that purpose. The rates per
26 cent ordered by the State Board of Equalization shall be extended on the assessed valuation of property as corrected and equalized by the County Board. In all cases of extension of valuations, where the equalized valuations shall happen to be fractional, the clerk shall reject all such fractions as may fall below fifty cents; fractions of fifty cents or more shall be extended as one dollar.

"Section 4281. (14) Auditor—duties of. It shall be the duty of the Auditor to make in each assessor's book a certificate of the rate of deduction or addition determined by the State Board of Equalization in the county to which such books shall pertain. The Auditor shall make out over his hand and official seal a certificate of the action of the Board of Equalization, which shall be transmitteed to the county clerk, and by him affixed to the assessor's books for the

said year, and entered of record in the order-book, and shall be the warrant of authority to the sheriff or collector for the collection of taxes as therein set forth."

The reports of the proceedings of said State Board of Equalization made in accordance with Section 4279 of the Kentucky Statutes, and Section 12 of said act, which is quoted above, show, and it is a fact, that the assessing and taxing authorities in Kentucky habitually, generally, systematically, intentionally and designedly assess for taxation the property of individuals and of corporations not required to report to the Board of Valuation and Assessment at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and at less than its actual value. The reports of the proceedings of the State Board of Equalization of Kentucky for the sessions of 1910, 1911, 1912 and 1913, omitting the tables, were as follows, to-wit:

27 "Honorable Augustus E. Willson, Governor of Kentucky, Frankfort, Kentucky.

"SIR: The State Board of Equalization respectfully submits the following report for the year 1910.

"The revenue laws provide that all property shall be assessed at its fair cash value. It was not contended that this was done in a single county; therefore, the Board of Equalization was not privileged to reduce any returned assessment.

"We selected those counties that most nearly conformed to the requirements of the law and endeavored to equalize the others with them. We do not claim that there was a perfect adjustment of values, but a majority of the Board gave a careful investigation and equalized property as nearly as possible with scant evidence and under an imperfect law. The conditions under which we worked were not favorable for accuracy. The assessment of the State, as a rule, was bad.

"There are very few capable assessors in the State, and the failure of most of them to acquaint themselves or comply with the mandatory provisions of the revenue laws was one of the chief difficulties. We had to contend with slovenness, ignorance and duplicity. The transfer sheets which were sent to us as an exhibit were often misleading; the purchase price of the property was hidden by '$1.00 and other considerations'; in violation of law 'listed with other lands'; transferred property was assessed at a greater percentage than property not transferred, and in many instances where the sale value was given the assessed and supervisors' value was withheld, thus preventing a comparison and defeating one of the principal purposes of the law.

28 "The witnesses that appeared before the Board were selected by the county judges of the various counties; naturally they were not chosen to give information detrimental to their county assessment, but usually to defend it, however bad. In many instances the testimony showed that the assessors accepted the values as given by the property owners, and the County Board of Supervisors made no material change. We recall one instance in which the

County Board of Supervisors reduced the real property $121,400.00, which was lower than the property-holders themselves had given in their property for assessment.

"The law requires that the correctness of the transfer sheets—which is the first evidence submitted to this Board—shall be verified by the county judge and the county attorney. It is not an exceptional case where it is admitted by both that they had signed in a perfunctory manner, without any character of investigation, and a chairman of a County Board of Supervisors testified that he had never seen the transfer sheets.

"The intangible property, which we are not privileged under the law to change—a schedule of which is given the Board to indicate the tendency of the assessment—shows beyond question that ninety per cent of that character of property escapes taxation, and in one instance, where the amount is approximately known to be an asset of $6,000,000, it is returned $28,500, being 43/100 of one per cent.

"The chief plea as an objection to an increase is the lack of uniformity of assessment, and that an increase would work a hardship on the poorer people in the community whose property was assessed at a greater percentage of value than their wealthy neighbors, — which, if true, the Board of County Supervisors is alone blameable.

"The increase made by the State Board of Equalization av-
29 erage- 8 per cent, and, with this addition, is no measure of the cash value of the property in the state.

JOHN E. GARNER, *Chairman.*
F. P. JAMES.
C. H. HATCHETT.
J. T. EARLE.
W. R. WATERS.
EDGAR RENSHAW.
JNO. W. LEWIS."

"Attest:
W. S. CARVER,
Chief Secretary.

"FRANKFORT, KY., May 31, 1911.

"Honorable Augustus E. Willson, Governor of Kentucky, Frankfort, Kentucky.

"SIR: The State Board of Equalization and Assessment respectfully submits the following report for the year 1911.

"In this, as in former years, there was no occasion for reducing any county's returned assessment. Not one of them was assessed at a measure of its fair cash value. Forty-seven counties were not changed—not for the reason that the Board considered them properly assessed, but because, if they were increased, the counties that had a per cent added would have to have been raised correspondingly higher.

"The law governing the Board has not been changed in any particular during your administration. The Legislature has not seen fit to make an addition or change which would enable the Board to

more probably arrive at an accurate conclusion in its endeavor to equalize values among the counties.

30 "The transfer sheets upon which we are to primarily base our decision, as they are at present returned, are in most cases almost worthless; some for the reason that the purchase price is purposely hidden under '$1.00 and other considerations'; many have no value fixed by the county supervisors; some have no value fixed by the assessor; much is 'listed with other property'; in numbers of instances the acreage is not given; in nearly all some one term is withheld, which makes a comparison between the sale value, assessed value and Supervisor's value impossible. In many cases it is a result of ignorance, carelessness or slovenness; in others, shrewdness and duplicity—done purposely to mislead. When witnesses are sent, they oftener serve to confuse than otherwise. All witnesses who appear before the Board are appointed by the County Judge after he has received notice of a tentative raise by the Board. It is seldom that the judge will select a witness who has not formed an opinion and expressed a desire to appear in defense of his county. All the evidence before the Board is ex parte. The record is made up by the county officials and all witnesses selected for the purpose of testifying for the defense.

"There are a few good assessors in the State—we say a 'few' for the lack of a general term that expresses a lesser number.

"The impression seems to be gaining ground throughout the State that we have a 'single tax' system, and that personal property is exempt from taxation, and, inasmuch as real estate is compelled to bear the burden, it is the privilege of the owner and the duty of the officials to connive to list all property at a very low figure. In the matter of personal property no witness testified that the assessor claimed to have assessed it fully, or that the owners had intended to give it in at its worth. In substance, they contend that it is not given in anywhere, and excuse themselves on the ground that it is a matter of perjury or poverty, and exercise their right of choice.

31 "The result is that after the number of lists that the assessor arbitrarily increases is added to the number that the County Board of Supervisors raise, there remains about 95 per cent of the people in the State who fix the sum themselves upon which they are willing to pay taxes, and it is a safe assertion that 99 per cent of that 95 per cent are not inclined to pay a great amount.

"From the testimony of the average witness who appears before this Board, there is very little good land in his section of the State, and what is there is mainly in adjoining counties; in his particular county there is a poor streak extending the length and width of the county from which all the timber has been cut and marketed; the process of erosion has carried all the fertile soil into the Gulf of Mexico; that a peculiar and unprecedented condition exists in regard to the bottom lands in his county, unlike the conditions along most streams that enrich the land, but the current of the stream changes and washes it away; and if by accident there is a deposit, it is always of sand, that destroys its future productiveness; that there is here

and there an occasional oasis of small area upon which the tireless farmer can eke out an existence, and, by the addition of a small mortgage, pay his taxes.

"The cities do not labor under exactly the same difficulties, but their difficulties are just as difficult. It seems that in all the cities the railroads have secured quantities of land for terminal facilities that are withheld from assessment; in addition to which, the smoke, noise and dust has destroyed the value of property for blocks on either side. Schools and churches have also acquired valuable property which is exempt from taxation; this also lessens their total. The money in banks is owned by non-residents, country banks and the Federal Government. The remaining few dollars left among their citizens is mainly for the purpose of street car fare. Business has been removed from the principal streets and is yet
32 unlocated. In fact, the city would go into the hands of a receiver if there were anything to receive or anybody who would receive it.

"Many counties insist that any increase in their present assessment would impoverish them; possibly this complaint has been loudest from the pauper counties that are a liability of the State—that not only expend every dollar collected for taxes in their own county, but are beneficiaries from the State of many thousand dollars each year.

"The final action of this Board has been reported to the Auditor, and, while not claiming that it is infallible, it is the result of arduous work and unprejudiced judgment.

"*Respectively* submitted,

JOHN E. GARNER, *Chairman.*
C. H. HATCHETT.
J. T. EARLE.
F. P. JAMES.
W. R. WATERS.
EDGAR RENSHAW.
I. G. MASON.
JNO. W. LEWIS.

"Attest:
W. S. CARVER,
Chief Secretary."

"Hon. James B. McCreary, Governor of Kentucky.

"SIR: Your State Board of Equalization respectfully submits herewith its report for 1912.

"This body has been in session continuously from February 10th to this date, May 31, 1912, and within that time has heard delegations from nearly every county in the State.

"Our figures for this year show a decrease in the total assessments on real and personal property. We made raises only where
33 a great falling off was shown in assessment as compared with the preceding year, it being the policy of the Board not to increase arbitrarily the assessment of any county.

"This Board has endeavored at all times to be fair in its deliberations, and has, as far as possible tried to satisfy the various representatives who have appeared before it to protest against a raise in assessment; yet it has not, at any time, overlooked its duty to the State of Kentucky.

"We have raised the assessment of about fifty per cent of the counties in the State, and the action of the State Board of Equalization for this year on all classes of property is shown in the various tabulated statements compiled by our secretaries and transmitted herewith.

"Respectfully submitted,

M. J. MEAGHER, *Chairman.*
EDGAR RENSHAW.
J. T. PENICK.
JOHN W. LEWIS.
T. P. CRAIG.
J. T. EARLE.
J. P. HOWES.

"Attest:
VICTOR V. PACKWOOD,
Chief Secretary."

"FRANKFORT, KY., May 31, 1913.

"Hon Jas. B. McCreary, Governor of Kentucky.

"SIR: This Board met February 10th (time specified by law) and will adjourn today, May 31st.

"When the secretaries had gone over the recapitulation sheets and transfer, we took up the counties of the 7 Appellate Districts and passed preliminarily upon them; we set days for hearing the witnesses from each county.

34 "We, in every county, notified the county judge of our preliminary action; in a number of counties the judge accepted our preliminary work and it became final. We made raises in a majority of the counties, in several of them, not as much as should have been, but on account of the disastrous floods that visited them, we thought best not.

"We made no arbitrary raise, in every instance the facts authorized us.

"We want to compliment the county judges of Kentucky on the delegations sent before this Board. We found them to be gentlemen. While at all times remembering our duty to the State we have tried to make it pleasant for the gentlemen before us; with a few exceptions, so very few we may call it unanimous, the county delegations before our Board have gone away satisfied, in a good humor, acknowledging that our final action was just to them and the State of Kentucky.

"We believe that the work done this year will be fruitful, that

next year the counties throughout the State will send better assessments.

"Respectfully,

Officers.

Chairman.
HON. M. J. MEAGHER.

Secretaries.
WILL P. WALKER.
JAS. H. DALE,
ROWAN SAUFLEY.

Members.

First District: EDGAR RENSHAW, Hopkinsville.
Second District: R. G. CARY, Calhoun.
Third District: JOHN W. LEWIS, Springfield.
Fourth District: THOS. P. CRAIG, Louisville.
Fifth District: M. J. MEAGHER, Frankfort.
Sixth District: J. T. EARLE, Covington.
Seventh District: J. F. HOWES, Paintsville."

The equalized value of property equalized by the said State Board of Equalization for 1913, referred to in the report of May
35 31, 1913, hereinabove set forth, was $852,181,205, or less than $12,000,000 in excess of the equalized value of the property equalized by said Board for the year 1912, $840,479,194, referred to in aforesaid report of said Board for that year.

House Resolution No. 24, passed by the General Assembly of Kentucky, and approved by the governor on the 15th day of March, 1912, provided for the appointment of a State Tax Commission, and the report of said Tax Commission filed with the governor February 12, 1913, showed inter alia with reference to the report of the State Board of Equalization for 1911, the following:

"The State Board of Equalization, in its report for 1911, said: 'The impression seems to be gaining ground throughout the State that we have a "single tax" system and that personal property is exempt from taxation and inasmuch as real estate is compelled to bear the burden, it is the privilege of the owner and the duty of the officials to connive, to list all property at a very low figure.'"

"These facts and this condition of affairs is not secret in the Commonwealth, and similar conditions exist in all of those States which adhere to the General Property Tax. The owners of intangible property, such as money, notes, bonds, stocks, etc., fail to list this character of property, justifying themselves on the ground that if they do give it in at all, it necessarily must be assessed at its full value, while real estate is only assessed at from 20 to 70 per cent of its true value, and consequently if they list their intangible property, it necessarily will bear more than its proportion of the public burden. On the other hand, the owners of real estate and tangible personal property claim that holders of tangible
36 property, such as described above, only list for taxation a small part, if any, of their holdings, and that real estate should not be assessed at its full value, otherwise that the owners

would bear more than their proportion of the public burden. The assessors (120 counties) recognizing the truth of these respective claims, and knowing that assessed value- in other counties are low, attempt to equalize matters by assessing real estate at a very low value, not only for the protection of the individual holders of this class of property, but each assessor, for fear if he does not, his county will be made to furnish an undue proportion of the State revenue as a result of this undervaluation in other counties. These are the conditions with which we are confronted in Kentucky and which demand the most earnest and thoughtful consideration of our people, if our State is to keep pace with other States. It is fundamental that we shall have a sound and equitable system of taxation which will invite capital to invest and not repel it, as is the case under our present system."

IX.

By Section 182 of the Constitution of the State of Kentucky, it is provided as follows:

"Nothing in this Constitution shall be construed to prevent the General Assembly from providing by law how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And, until otherwise provided, the present law on said subject shall remain in force."

The statutes of Kentucky, with reference to the assessment of the franchises or intangible property of corporations generally,
37 provide for a Board of Valuation and Assessment and for the duties of said Board, as follows:

"Section 4077. (1) Franchise—Assessment of. Every railway company or corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 1 (4095) of sub-division 4 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said

Board, and shall convene the same from time to time, as the business of the Board may require. It shall be the duty of the Attorney-General, when requested by the Board of Valuation and Assessment, to attend said Board at its meetings and advise with same in its proceedings.

38 "Section 4078. (2) Corporation to report to Auditor to determine value of franchise. In order to determine the value of the franchises mentioned in the next preceding section, shall, annually, between the thirtieth day of June and the first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz., the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

"Section 4079. (3) Value of franchise—how determined—lines extended beyond State or county. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased, or controlled in this State and in each county, incorporated city, town or taxing district, and the entire line oper-

39 ated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchise to be taxed, the said Board may excuse the officer from answering such questions: Provided, That said Board, from

said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

"Section 4080. (4) Foreign corporation—franchise—how determined. If the comporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the Board shall fix the capital stock in this State by capitalizing the net income derived in this State, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company, or association in this State, and elsewhere,
40 the proportion which the gross receipts of this State, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this State, less the assessed value of the tangible property assessed or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

"Section 4081. (5) Interstate Carrier—franchise—how fixed. If the corporation organized under the laws of this State, or of some other State government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company or a corporation performing any other public service, the lines of which extend beyond the limits of the State, the said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased and controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district, through or into which such lines pass, or are operated, in the same proportion that the length of the lines in such county, city, town or district bears to the whole length of lines in this State; but if any such railroad or other corporation organized under the laws of this State have all of its lines outside of this State, the said Board shall fix the value of its entire capital stock as hereinbefore provided, and apportion to this State for taxation therein the proper proportion and not less than one per cent of its said capital stock, and the amount so apportioned
shall be the value of its intangible property, including its cor-
41 porate franchise, stocks, bonds, securities and choses in action, subject to taxation in this State and in the county, city, town and district where its principal place of business in this State may be located.

"Section 4082. (6) Persons engaged in certain business, how valued for taxation. Whenever any person or association of persons not being a corporation, nor having capital stock shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein shall be deemed and treated as the capital stock *for* such person or association of persons for the purpose of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

"Section 4083. (7) Auditor to notify corporation of values. It shall be the duty of the Auditor, immediately after fixing such values by said Board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such Board and ask a change of the valuation, and may introduce evidence, and the chairman of the Board is hereby authorized to summons and swear witnesses and, after hearing such evidence, the Board may change the valuation as it may deem proper, and the action of the Board shall be final.

"Section 4084. (8) Auditor to certify to County Clerk. The Auditor shall at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise or any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax, and such certificate shall be by each county clerk filed in his office,
42 and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection, and all county, city, municipal, school and other taxes shall be due and payable thirty days after the notice of the amount of such tax is given by the officer whose duty it is to collect the same.

"Section 4085. (9) Property to be assessed in name of corporation—penalty for failure to report—exemption of stockholders. The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and for a failure, shall be subject to the penalties in this article provided; and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation. (See, also, Sec. 4088.)

"Section 4086. (10) Pay taxes into State Treasury. All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all taxes due the State from them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

"Section 4087. (11) Penalty for failing to make required reports. Any corporation, or officer thereof, wilfully failing or re-

fusing to make reports as required by this chapter shall be deemed guilty of a misdemeanor and for each offense shall be fined one thousand dollars and fifty dollars for each day the same is not made after October the first of each year.

"Section 4088. (12) When stockholders are exempt. The individual stockholders of the corporation which are, by this article, required to report and pay taxes upon the corporate franchise
43 shall not be required to list their shares in such companies so long as the corporations pay the taxes on the corporate property and franchises as herein provided. (See, also, Sec. 4085.)

"Section 4089. (13) Receivers to report. Should any corporation required to make the report as hereinbefore provided be in the hands of, or under the control of, a receiver or other person, it shall be the duty of such receiver or other person to make the return and valuation as hereinbefore required.

"Section 4090. (14) Corporation failing to report—Board to fix values. Should any corporation fail to make the reports as required herein on or before the first day of October of each year, the said Board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the value of the corporate franchise liable for taxation as aforesaid and the corporation shall be taxed accordingly.

"Section 4091. (15) Taxes when due—penalties—clerks to furnish statement of value of tangible property. All the State taxes assessed against any corporation, company or association, under this article, shall be due and payable thirty days after notice of the same has been given said corporation, company or association by the Auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent per annum. Any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent,
44 shall be deemed guilty of a misdemeanor and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction. It shall be the duty of the county clerk to furnish to the Auditor of Public Accounts, on blanks provided by the Auditor, a statement of the assessed value of the tangible property of all corporations, companies or associations paying a franchise or other tax under this act.

"Any county clerk failing to comply with the requirements of this act shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten nor more than twenty-five dollars."

And under color of said statutes, and upon an unreasonable, capricious, and fraudulent assessment pretended to have been made thereunder, defendants are threatening and attempting to, and un-

less enjoined and restrained by this Honorable Court, will deprive plaintiff of its property without due process of law and in denial of the equal protection of the law, as hereinafter more particularly set forth.

X.

With respect to the tangible property of railroad companies, the General Assembly has provided in the following sections of the Kentucky Statutes:

"Section 4096. (1) To report to Auditor—penalty for failure. That the president or chief officer of each railroad company, or other corporation owning or operating a railroad line, in whole or in part in this State, and all railroad bridge companies owning or operating the bridge spanning a river constituting the boundary of this
45 State, shall, on or before the first of August in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporated town and taxing district therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities and incorporated towns in which the same are located. That if any of said railroad companies own or operate a railroad or railroads out of this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of August shall subject the president or chief officer residing in this State to a fine of one thousand dollars and fifty dollars for every day after the first day of August that he fails to file said report, to be recovered as indicated by Section 9 (4104) of this article.

"Section 4097. (2) Receiver to report—Auditor to fix value of road not reporting. Should any railroad or bridge, or part of a line of railroad in this State be in the hands or under the control of a receiver or other person, by order or decree of any court in this or any other State, it shall be the duty of such receiver or other person to make, under oath, the returns and valuations required by the first section of this article; and should
46 the president or chief officer of any railroad company, or such receiver fail to make said return and valuations on or before the first day of August in each year, the said Auditor shall proceed and ascertain the facts and values required by this article to be returned, and in such manner and by such means as he may deem

best, and at the cost of the company failing to make the returns and values.

"Section 4098. (3) Railroad Commission to equalize. The Auditor shall lay before the Railroad Commission, on or before the fifteenth day of August, the returns made to him under this act, and any schedules and valuations he may have made under Sections 1 and 2 (4096 and 4097), of this article. And should the valuations, or any of them, in the judgment of said Board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said Board shall keep a record of their proceedings, to be signed by each member present at any meeting, and the said Board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose.

"Section 4099. (4) Superintendent of schools and clerk to furnish boundary to company. It shall be the duty of the county superintendent of county schools in each county in which a railroad or bridge is operated to furnish, on or before the first day of July of each year, to such railroad or bridge company or companies, the boundary of each graded or common school district through or into which any part of such railroad or bridge or other railroad or bridge property is situated; and the county clerk of any county containing any other taxing district through or into which any railroad or bridge is located shall make a similar report to such railroad or bridge company. Any county superintendent or county clerk fail-
47 ing to make report as herein required, or who shall make false report, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than one hundred dollars for each offense.

"Section 4100. (5) School tax paid to superintendent. All taxes against any railroad or bridge company, which shall be levied in any common school district, shall be paid to the superintendent of common schools of the county for the benefit of the district entitled thereto.

"Section 4101. (6) White and colored school districts. The provisions of this law shall not be construed to apply to any colored school districts: Provided, that the same rate of taxation assessed against the real estate of any railroad or bridge company or corporation in any graded school district or common school district, in any year, shall be assessed against all of the taxable property, in such district, and the railroad or bridge tax, when collected, shall be paid over to the county superintendent of the county in which the district school house wherein the tax assessed shall be situated, and shall constitute and be held by the county superintendent as a graded or common district school fund; and the said fund shall be apportioned and distributed by the county superintendent between the white graded common school or white common school district wherein said tax shall be collected and any colored common school district which shall be located over the same boundary; the distribution shall be in the same ratio that the whole num-

ber of white children of pupil age and the whole number of colored children of pupil age residing in the district shall bear to the whole number of children, white and colored, residing in the district wherein such tax shall be collected.

"Section 4102. (7) Rate of taxation—bridges—Auditor to notify clerks. The same rate of taxation for State purposes which is or may be in any year levied on other real estate, shall be, and
48 is hereby levied upon the value, so found by said Board, of the railroad bridge, rolling stock and real estate of each company; and the same rate of taxation for the purposes of each city, town, part of a county or tax district, of any kind, in which any portion of any railroad or bridge is located, which is, or may be, in any year levied on other real estate of said company therein, and of the number of miles of said road, therein, reckoned as of the value of the average of each mile of such railroad, with its rolling stock, as ascertained as aforesaid; Provided, that railroad bridges, spanning any river which constitutes the boundary or State line of the Commonwealth, shall be assessed as of the counties in which they are located, and local tax derived therefrom shall be applied to each city, town, county or tax district in which said bridges are or may be located. And immediately after said Board shall have completed its valuations each year, the Auditor of Public Accounts shall notify the clerk of each county court of the amount so assessed for taxation in his county, and each railroad or bridge company of the amount of its assessment for taxation for State purposes and for the purposes of such city, town, county, part of county and tax district.

"Section 4103. (8) Taxes when due—penalties. All State taxes assessed against any railroad or bridge company shall be due and payable thirty days after notice by mail of the assessment given by the Auditor, and all *counties*, city, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every such company failing to pay its taxes after receiving such thirty days' notice of the amount of such tax shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent per annum. Any railroad or bridge company failing to pay its taxes, penalty and interest, after be-
49 coming delinquent, shall be deemed guilty of a misdemeanor, and on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction.

"Section 4104. (9) Taxes—penalties and interest—recovery of. Taxes, penalties and interests due the Commonwealth from any railroad or bridge company may be recovered by the Auditor of Public Accounts, by action in the name of the Commonwealth, in the Franklin Circuit Court; and those due any county, city, incorporated town or taxing district may be recovered by the officer authorized to receive the same, by action in the name of the Commonwealth in any court of competent jurisdiction."

XI.

The Statutes of Kentucky provide as follows with reference to the official duties of the defendants:

"Section 144. (With reference to the duties of the Auditor.) Accounts of receipts and expenditure—how kept. He (The Auditor of Public Accounts) shall keep a separate account of all taxes collected, so as to exhibit the amount collected under each law. He shall keep a correct list of all balances due by the Commonwealth to individuals, and by individuals to the Commonwealth. He shall keep an account of all claims of debt or credit which may exist between the general government and this State, and between this State and any other State; and an account between the Commonwealth and all her civil officers whose salary or wages are payable out of the treasury; the compensation to members of the General Assembly and the officers thereof, an account of which is to be kept in separate books by the clerk of House, certified and deposited with the Auditor.

50 "Section 145. Duty of Auditor and Attorney General concerning claims—costs. He shall audit and enter in accounts all other demands payable at the treasury; all accounts of the collection of the revenue or other tax or public money, and of all public debts. All public officers or public debtors who fail to render their accounts at the proper time, or to pay the money in their hands due the Commonwealth into the treasury, the Auditor shall report to the Attorney General, and cause proceedings to be instituted against them, and the Attorney General shall prosecute and enforce the performance of such duty and the payment of the money into the treasury. If, upon any such judicial procedure, it shall appear that nothing is due the Commonwealth, the defendant shall, nevertheless, pay the cost.

"Section 152. Authority to Treasurer to receive money. He shall grant written authority to the Treasurer to receive money from public officers, or other persons, due to the Commonwealth, stating the person, the amount to be paid in, and on what account paid, and charge the same to the Treasurer, in an appropriate book, under its proper head.

"Section 4686. Money to be paid to Treasurer upon permit of Auditor—where deposited. All public moneys and dues to the Commonwealth shall be paid into the treasury upon the written permit or authority of the Auditor as now or may hereafter be provided by law; and the same, when paid to the Treasurer, shall be by him, on the same day, deposited in one of the State depositories designated as hereinafter provided; and all permits shall be filed and carefully preserved by the Treasurer.

"Section 4695. Receipts to be given by Treasurer and Auditor. The Treasurer shall receive all money due or payable to the Commonwealth from collectors of revenue, public officers and others when tendered, accompanied by the permit of the Auditor of Public Accounts, stating the amount to be received, on what ac-

51 count, and from whom to be received, in what to be paid. He

shall immediately make out a receipt for the amount received, and for what and of whom received, and in what same is paid, and deliver it to the Auditor, who shall in like manner give a receipt to the officer or person paying the same. The receipt, besides stating the amount paid, shall also, if it be all that is due from the officer or other person, so state.

"Section 112-15. 1 (With reference to Attorney General.) Duties of—generally. The Attorney General shall be the chief law officer of the Commonwealth, and all its departments. The Attorney General shall appear for the Commonwealth in the trial and argument of all cases, civil and criminal, in the Kentucky Court of Appeals whenever the Commonwealth is directly or indirectly interested; he shall also appear in behalf of the Commonwealth in any court or tribunal in or out of this State in any case or proceeding in which the Commonwealth is a party in interest, except where it is made the duty of the Commonwealth's Attorney or county attorney to represent the Commonwealth. He shall institute all actions and proceedings necessary to cause the payment of all judgments and demands of the Commonwealth, payable at the State Treasury, not discharged in the proper time. He shall, with the assistance of the Auditor of Public Accounts, investigate the condition of all unsatisfied claims, demands, accounts, and judgments in favor of the Commonwealth, and shall take all necessary steps, by motion, action or otherwise, to collect or cause to be collected such claims, demands, accounts and judgments, and paid into State Treasury.

"Section 118. Duties of Commonwealth's Attorney—when assistant employed in civil cases. It shall be the duty of the Commonwealth's Attorney to attend each circuit court holden in his district, and prosecute all violations of the criminal and penal laws therein, and discharge all other duties assigned him by law; and he
52 shall also, except in Franklin County, attend to all civil cases and proceedings in the circuit court of his district in which the Commonwealth is interested; but in civil cases the Governor may employ counsel to assist the Commonwealth's Attorney, the fees of such counsel to be paid out of the State Treasury upon a voucher signed by the Governor.

"Section 122. Duty to collector for Commonwealth—compensation. He (the Commonwealth's Attorney) shall give the collector of money due the Commonwealth in each county of his district all necessary advice in regard to motions against delinquent collecting officers for failure to return executions, and shall prosecute such motions. For his services he shall be allowed ten per cent out of the damages imposed by law and collected against such officers for such failure.

"Section 127. (With reference to County Attorney.) Duty to prosecute and defend actions, and assist Commonwealth's Attorney. He shall attend to the prosecution of all cases in his county in which the Commonwealth or the county is interested; and, when so directed by the county or fiscal court, institute or defend, and conduct actions, motions and proceedings of every description, before any of the

courts of this Commonwealth in which the county is interested, and shall in no instance take a fee or act as counsel in any case in opposition to the interests of the county. He shall also attend the circuit courts held in his county, and aid the Commonwealth's Attorney in all prosecutions therein, and in the absence of an acting Commonwealth's Attorney, he shall attend to all Commonwealth's business in said courts."

53 XII.

Heretofore, to-wit, some days after October 23, 1913, plaintiff received notice of an assessment of the value of its franchise in the State of Kentucky made by the State Board of Valuation and Assessment for the year 1913, in words and figures as follows, to-wit:

"State of Kentucky,
Office of Auditor of Public Accounts.

"FRANKFORT, KENTUCKY, October 23, 1913.

"To The Louisville & Nashville Railroad Company:

"The State Board of Valuation and Assessment for the State of Kentucky begs to notify you that, after a consideration of your report to the Auditor of date June 30, 1912, for taxes for the year 1913, and after a consideration of other evidence hereinafter mentioned, we have fixed the capital stock of the Louisville & Nashville Railroad Company in Kentucky at the valuation of $76,000,000, and we have deducted therefrom the assessed value of your tangible property in Kentucky, to-wit, $28,806,072, which leaves the value of your franchise $47,193,928.

"We beg to state to you that in making this tentative assessment of your property for said year, we were not governed by any particular rules, as it was our intention to fix the value of your property in this State approximately, and to go more into details in making the final assessment, after hearing all of the proof that you had to offer, if any, and after a consideration of such other legal proof as might be brought before us.

"We beg to state, however, that we found the net income of
54 your road to be approximately $15,840,000, which, by capitalizing same at six per cent, gave us as the total value of your entire capital, $264,000,000. We apportioned to Kentucky that proportion of this sum which the operated mileage in Kentucky bears to the operated mileage in Kentucky and elsewhere, approximately 34 per cent, and found that by following this plan, the value of the total capital stock in Kentucky of your road would be approximately $90,000,000.

"We also found on the stock and bond plan that the capital stock of the operated roads belonging to your company amounts to $226,000,000, in round numbers. We also ascertained that your company owns a controlling interest in the Nashville, Chattanooga & St. Louis Railroad, the Chicago, Indianapolis & Louisville Railroad, the South

& North Alabama Railroad, the Georgia Railroad, and the Louisville, Henderson & St. Louis Railroad, and by referring to Poor's Manual, we found that the total assets of these roads, in round numbers, amounts to $110,000,000, which, when added to the $226,000,000, gives the total capital stock of your road as of the value of $336,000,000, in round numbers, and we apportioned to Kentucky of this sum the proportion that the roads operated, owned, leased and controlled in Kentucky bears to the roads owned, operated, leased and controlled in Kentucky and elsewhere, which is about 25 per cent, and found that this gave the value of the capital stock in Kentucky at approximately $85,000,000.

"From these calculations, we were of the opinion that the value of the capital stock of your company in Kentucky would be as much as $76,000,000, after making all necessary deductions and after equalizing with other property in this State which is assessed by this Board, and it was in this way and for this reason that we fixed the value of the capital stock of your company in Kentucky at $76,000,000 as a tentative assessment.

55 "This tentative assessment was made prior to the decision of Judge Cochran in the case involving the assessment of your company last year, and since his decision we feel it incumbent upon us to follow as nearly as possible the principles which he thinks should be followed in assessing your road.

"Since giving you the original notice, you have appeared before us and entered a motion that the notice be quashed because same is not sufficient under the decision of Judge Cochran, and after consideration we sustained your motion and quashed said notice, and since quashing said notice, we have again considered the same matters above referred to, and have arrived at the same conclusion that we arrived at at the time we gave you the original notice which was quashed. We have also attempted to follow the opinion of Judge Cochran in making this tentative assessment and before giving you this notice, and using as your total capital stock the valuation of $264,000,000, we have found that of this sum, according to your report to the Auditor, $177,000,000 is tangible property.

"If we should apportion the tangible property to Kentucky by taking the proportion that the lines owned, leased, operated and controlled in Kentucky bears to the lines owned, operated, leased and controlled in Kentucky and elsewhere, or approximately 25 per cent, we would find that the value of the tangible property apportioned to Kentucky would be, in round numbers, $44,250,000.

"The Board has given consideration to the affidavit of Milton H. Smith, the president of your company, filed in the case of your company against Siler and others, late pending in the Federal Court for the Eastern District of Kentucky, and have also given consideration to your report of the net income and gross income derived from business done in Kentucky as shown by your report to the Railroad Commission of Kentucky as of date June 30, 1912, and we find that from a consideration of these matters, the value of your tan-

56 gible property in Kentucky is as much as $70,000,000. Since we only obtained $44,250,000 by apportioning on the mileage

basis above referred to, we find that by following this method the excess value of your tangible property in Kentucky is $25,750,000, which, when added to the $44,250,000, would give a total of $70,000,000 as the value of the tangible property of your company in Kentucky. If $177,000,000 is the value of your total tangible property, and $264,000,000 is the value of your total property, it necessarily follows that your intangible property is of the value of $87,000,000. If we should apportion to Kentucky on the proportion that the lines owned, operated, leased or controlled in Kentucky bears to the lines owned, operated, leased and controlled in Kentucky and elsewhere, which is about 25 per cent, we would obtain approximately $22,000,000, as the value of the intangible property in Kentucky, which, when added to the $70,000,000, the value of the tangible property, would give as the value of your capital stock in Kentucky the sum of $92,000,000, which sum would be increased a million or more dollars by using the exact proportions instead of the approximate proportions.

"If we should follow literally Judge Cochran's opinion, we would take the percentage that the gross income in Kentucky bears to the gross income in Kentucky and elsewhere as the proper proportion between the value of the intangible property in Kentucky and elsewhere, which is approximately about 40 per cent, and using this proportion, we would find that Kentucky's share of the intangible property is in round numbers $35,000,000, which, when added to the $70,000,000 would give the total value of your property in this State as $105,000,000.

"We beg to advise you that it was from a consideration of these matters mentioned that led us to fix the value of your total capital stock in Kentucky at $76,000,000, and in doing so we considered that we had made all necessary deductions, and that we had
57 equalized your property so that it was not assessed any higher for taxation than other property assessed by this Board, and we also beg to suggest to you that these things will have much influence with us in making the final assessment, and to this end we expect you to show us upon final hearing whether or not we have your net income correctly stated, and whether the value of your property in this State has increased or decreased since the year 1905, and if it has decreased or increased, we shall expect to show us in what respect and to what amount. We shall also expect you to show us the value of the assets of the roads which are controlled by you, as well as any other information that will aid us in giving proper consideration to the assessment of your property.

"In conclusion, we beg to state that the State Board of Valuation and Assessment has had the report of your corporation for June 30, 1912, for the taxes of 1913, under consideration, and has assessed the value of your franchise as follows:

Capital stock	$76,000,000
Less amount of tangible property assessed for taxes in this State	28,806,072
Value of franchise	$47,193,928
Tax at 50 cents on each $100	$235,968.64

"Under the law you will have thirty days in which to appear before the Board to introduce evidence and ask for a change in the assessment. Should the thirty days expire without a protest, this assessment becomes final.

"Yours truly,

H. M. BOSWORTH, *Auditor.*

"Make checks payable to State Treasurer, but mail to this office."

58 And thereupon, and within the thirty days' time allowed by law for such purpose, plaintiff went before said Board and asked for a change of the valuation. The protest and petition made by plaintiff for a change and reduction of said assessment and valuation of its franchise for taxation in the State of Kentucky for the year 1913 was filed with the Board, to-wit, on November 14, 1913, and was in words and figures as follows, to-wit:

"Before the Board of Valuation and Assessment of the State of Kentucky.

"Protest and Petition of the Louisville & Nashville Railroad Company for a Change and Reduction of the Valuation of Its Franchise for Taxation in the State of Kentucky for the Year 1913, as Shown by the Second Tentative Assessment of the Board made October 23, 1913.

"Now comes the petitioner, Louisville & Nashville Railroad Company, by Henry L. Stone, William A. Colston, and Robert E. Fleming, its attorneys, and protests against the assessment of its franchise made by the Board of Valuation and Assessment of the State of Kentucky for taxation for the year 1913, as appears from the notice of such assessment given by H. M. Bosworth, Auditor, to-wit, under date of October 23, 1913, and asks a change and reduction of the valuation of said franchise and says:

"1. That the assessment now complained of is the same as the assessment heretofore made under date of June 28, 1913, previously complained of in protest and petition filed by this petitioner; that in said assessment of June 28, 1913, the values of petitioner's capital stock, tangible property assessed by assessor for State taxes,
59 and franchise, and the amount of tax at 50 cents on each One Hundred Dollars of the franchise were shown as follows:

Capital stock	$76,000,000.00
Less amount of tangible property assessed by assessor for State taxes	28,806,072.00
Value of franchise	$47,193,928.00
Tax at 50 cents on each $100.00	235,968.64

And the values and amount of taxes at 50 cents on each $100.00, as shown by the notice of October 23, 1913, were as follows:

Capital stock	$76,000,000.00
Less amount of tangible property assessed for taxes in this State	28,806,072.00
Value of franchise	$47,193,928.00
Tax at 50 cents on each $100.00	235,968.64

That there is nothing in the second tentative notice of assessment, to-wit, of October 23, 1913, to show what mode or method, plan or principle was used or adopted by the Board in arriving at the assessment of petitioner's franchise just as there was nothing to indicate this fact either in the tentative assessment dated June 28, 1913, or in any of the files or records of the Board respecting the assessment.

"And petitioner says that, by reason of the failure and refusal of the Board to furnish the information showing the principle upon which the Board proceeded, or the mode or manner employed by it for estimating the value of petitioner's franchise, petitioner is left to conjecture and can not introduce evidence showing specifically, fully, and intelligently the errors in the calculations, valuations and apportionments made by the Board in reaching said tentative assessment, unless and until petitioner is informed of what property was
60 valued and assessed by the Board and how the valuations and assessments were arrived at.

"And, in order that it may have such notice of the fixing of the values of its franchise by the Board as will enable a full, intelligent, and effectual production of evidence and a hearing such as is contemplated by the Kentucky Statutes, petitioner asks that, before it be required to go on with such hearing, the Board of Valuation and Assessment furnish to it or its counsel information showing definitely the principle on which the Board proceeded and showing definitely the mode or manner employed by it of estimating the value of petitioner's franchise, and that the Board furnish petitioner or its counsel before said hearing definite answers to the following inquiries, to-wit:

"(*a*) Was the value of the total capital stock or entire property, tangible and intangible, in this State and elsewhere of the Louisville & Nashville Railroad Company arrived at by the Board in making its assessment on the stock and bond plan; that is to say, by taking the par or market value of the number of shares of stock and the par or market value of the total amount of the funded debt or mortgage bonds of that company issued and outstanding as of June 30, 1912, or as of any other date?

"(*b*) If the stock and bond plan was used, state the value fixed on such stock and how the same was arrived at and as of what date?

"(*c*) If the stock and bond plan was used, state the par or market value placed on such funded debt or mortgage bonds and as of what date, and state what value was used, if any other value than the par or market value was used?

"(*d*) State the total value arrived at on such stock and bond plan?

"(*e*) Was the total value of the capital stock or property, tangible and intangible, in this State and elsewhere of the Louisville &
61 Nashville Railroad Company arrived at in making the assessment on the capitalization of net earnings plan?

"(*f*) If so, state the amount of net earnings used in such capitalization and what items were taken and used to make up the same?

"(*g*) Was the amount of net earnings used and employed in such capitalization intended to represent the net earnings or net income for the year ending June 30, 1912, alone, or the average net earnings for a longer period than one year? If so, for what period and what are the amounts used for that purpose for each year and what was the average net earnings capitalized?

"(*h*) At what rate or percentage was the amount of net earnings capitalized?

"(*i*) What amount was thus obtained?

"(*j*) On what basis was the total value of the capital stock or of the entire value of all the property of the Louisville & Nashville Railroad Company, tangible and intangible, apportioned to the State of Kentucky?

"(*k*) What percentage was used and how was that percentage arrived at in apportioning to this State a share of the value of the entire capital stock or total value of property of that company, tangible and intangible?

"(*l*) If such apportionment was made on a mileage basis, was the same on basis of operated mileage alone inside and outside of this State? State the number of miles so used outside and the number of miles used inside this State for that purpose?

"(*m*) Was, or not, the value of the tangible property of the company located outside and inside this State ascertained and deducted from the total value of the capital stock or entire property before such apportionment to this State?

"(*n*) Was or was not the total mileage operated, owned, leased or controlled by the Louisville & Nashville Railroad Company
62 inside and outside of this State used in fixing the value of the corporate franchise of that company liable for taxation in this State?

"(*o*) If such mileage was so used, state the number of miles operated, owned, leased or controlled in this State and the total number of miles operated, owned, leased or controlled in this State and elsewhere so used or considered in ascertaining and apportioning to this State its share of the total value of the capital stock or entire property, tangible and intangible, of said company and what percentage of such total value was apportioned to this State?

"(*p*) Please furnish a statement or copy showing the figures and calculations whereby the amount or share of the value of the total capital stock or entire property, tangible and intangible, was apportioned to the State of Kentucky in making or fixing the assessment of the franchises of the Louisville & Nashville Railroad Company in this State?

"(*q*) Please furnish a statement or copy showing the figures and

calculations whereby the amounts of the capital stock or entire property, tangible and intangible, of the Louisville & Nashville Railroad Company in the State of Kentucky, was arrived at in making or fixing said assessment of the franchises of said company?

"(*r*) State what evidence besides the report made to the Auditor by the Louisville & Nashville Railroad Company as of June 30, 1912, as the basis for the assessment of its franchise for 1913, was used or considered by the Board of Valuation and Assessment in making the tentative assessment of the Louisville & Nashville Railroad Company's franchise as per notice from the Auditor dated June 28, 1913, and if any other reports or records were considered, say what parts of those records and reports were considered and what calculations were made upon the basis of such evidence?

"(*s*) Please furnish a statement of the calculations showing from beginning to end how the valuation of petitioner's
63 franchise was arrived at, including the ascertainment of the total value of petitioner's capital stock, or the value of petitioner's property, tangible and intangible, wherever situated, any adjustments or equalizations of or deductions from such values which were or are made, apportionment of such total value, or of the amount remaining from such total value after equalizations, adjustments, or deductions to the State of Kentucky; equalizations, if any made, or deductions, if any made, from the part of the value apportioned to Kentucky, and all other calculations used in process of arriving at assessment made of the value of petitioner's franchise.

"2. Petitioner says that the assessment made of the value of its franchise in the State of Kentucky for taxation for the year 1913, is excessive, unreasonable, unjust, illegal, and arbitrary, and that petitioner's franchise should not be assessed for taxation for the year 1913 in the State of Kentucky at a greater amount than $2,569,586.31,

as shown by the following facts and calculations:

"The total average market value of the shares of petitioner's capital stock (which was of par value of $60,000,000.00) for the fiscal year ended June 30, 1912, was not in excess of ..... 91,249,500.00.

"The average market value of all of petitioner's bonds outstanding as of June 30, 1912 (of par value of $136,078,500.00), was during the fiscal year ended June 30, 1912, not over..... 135,785,792.84.

"The average market value during the
64 fiscal year ended June 30, 1912, of petitioner's total capital stock and bonds outstanding as of June 30, 1912, was not over..... 227,035,292.84.

"And as was said by the Supreme Court of the United States in the State Railroad Tax Cases, 92 U. S. 575, it is obvious, with respect to assessment of franchise values for taxation, that when you have ascertained the current cash value of the whole

funded debt and the current cash value of the entire number of shares, you have by the action of those, who, above all others, can best estimate it, ascertained the true value of the road, all of its property, its capital stock and its franchises. For those are all represented by the value of its bonded debt and of the shares of its capital stock.

"But this total value of $227,035,292.84 includes the values of stock owned by petitioner in companies which are separately taxed in the State of Kentucky, and which are required to report and pay taxes upon their corporate franchises and which do pay taxes on their corporate property and franchises as provided by Kentucky Statutes, the values of which stocks amount to..... 30,761,799.35.

"Petitioner claims that these values should be deducted altogether from the Kentucky proportion of the value of its entire capital stock, and that if the deduction is made from total values within and without Kentucky before apportioning to Kentucky its proper share of all values, petitioner does
65 not obtain the full benefit of the deductions to which it is entitled. But even making the deduction before apportionment, there remains as the value of the entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company within and without the State of Kentucky, which can be properly considered by this Board in fixing the value of complainant's total properties for taxation in the State of Kentucky, not more than ..... 196,273,493.49.

"Petitioner's tangible property outside of the State of Kentucky is worth .....$130,917,782.15. And petitioner says that the assessment of property for taxation in Kentucky generally and in the parts of Kentucky in which petitioner's lines are situated, is at a rate not in excess of 60 per cent of its real valuation and that upon the assumption that the assessment of petitioner's tangible property in the State of Kentucky for the year 1912 ($28,806,072.00, not including property separately taxed) is 60 per cent of its real value, the value of petitioner's tangi-
66 ble property in the State of Kentucky, not including property separately taxed, is ..... 48,010,120.00.

And the value of petitioner's tangible properties, both within and without the State of Kentucky is at least	$178,927,902.15,
leaving as the value of petitioner's franchise or intangible property, both within and without the State of Kentucky	17,345,591.34.
"The proportion which the mileage operated, owned, leased or controlled by the petitioner in the State of Kentucky bears to the total mileage owned, leased, operated or controlled within and without the State of Kentucky is	24.6901 per cent,
and 100 per cent or full valuation of Kentucky's proportion of petitioner's franchise or intangible values within and without Kentucky is	$4,282,643.85.
"But property in the State of Kentucky is generally intentionally, habitually and systematically assessed at not more than 60 per cent of its full value, and petitioner is entitled to have its property equalized and assessed for taxation so as to put it on an equality with other taxpayers, and the value of petitioner's franchise for taxation in the State of Kentucky for the year 1913 is, therefore, not more than 60 per cent of $4,282,643.85, or	2,569,586.31.

67 "3. Petitioner denies the right or power of this Honorable Body to consider in the assessment of the value of its franchise for taxation any facts, figures, or circumstances not embraced in the report made to the Auditor for the purpose of determining the value of its franchise in accordance with Section 4078, Kentucky Statutes. And with respect to certain other evidence stated in the notice of October 23, 1913, to have been considered by the Board, petitioner points out the following as some but not all of the objections to the consideration of such other evidence.

"Complainant does not keep the books of the Nashville, Chattanooga & St. Louis Railroad, of the Chicago, Indianapolis & Louisville Railroad, or of the Louisville, Henderson & St. Louis Railroad, and cannot state what are the total assets of those roads, and petitioner says that the general balance sheets or statements of total assets of such roads which may appear in Poor's Manual or in any other similar publication are unreliable for the purpose for which the Board has attempted to use them, just as statements of petitioner's general balance sheet or statement of total assets made up in accordance with the requirement of the Interstate Commerce Commission is unreliable for the purpose of arriving at the full value of petitioner's property, tangible and intangible, wherever situated, or for fixing the value of petitioner's franchise. Some of the reasons why such general balance sheet statements or statements of total assets are unreliable are the fact that contingent assets and liabilities are frequently shown which are not real assets or liabilities, as such terms are usually understood, and there is frequently a duplication of as-

sets in Property Investment Account, resulting from the inclusion of the same amounts both in the Road and Equipment and in Securities, representing unissued stocks, bonds or other muniments of title placed upon such road and equipment.

68 "Petitioner says further that an attempt to tax it for either a part or all of the properties of the Nashville, Chattanooga & St. Louis Railroad, the Chicago, Indianapolis & Louisville Railroad, the South & North Alabama Railroad, Georgia Railroad, or the Louisville, Henderson & St. Louis Railroad, which are not included in this petitioner's own values, would be an attempt to tax petitioner for the properties of other persons or corporations and would be unreasonable and unlawful on that account.

"Petitioner further says that even if it be proper to consider the total values of the Nashville, Chattanooga & St. Louis Railroad, the Chicago, Indianapolis & Louisville Railroad, and the Louisville, Henderson & St. Louis Railroad, in arriving at the total value of petitioner's property, tangible and intangible, wherever situated, the total values of these other railroads must, in arriving at the values of petitioner's franchise for taxation in the State of Kentucky, be deducted from the proportion of total values assigned to the State of Kentucky, because these other railroads are required by the revenue and taxation laws of the State of Kentucky to report and pay taxes upon their corporate franchises in this State, and these other railroads do pay their taxes on their corporate properties and franchises as provided by the laws of the State of Kentucky, and unless the values of these railroads are deducted as aforesaid an assessment without such deduction will necessarily result in double taxation and be, therefore, unreasonable and unlawful.

"And petitioner further says that the inclusion of the total assets of the Nashville, Chattanooga & St. Louis Railroad, Chicago, Indianapolis & Louisville Railroad, the South & North Alabama Railroad, the Georgia Railroad, and the Louisville, Henderson & St. Louis Railroad in addition to the total assets of petitioner,

69 would necessarily result in double taxation, because there are already included in the total assets of petitioner those parts of the total assets of these other railroads which are represented by petitioner's interest in them.

"4. Petitioner says that this Honorable Board has no authority or jurisdiction to assess or to value or to adjust an assessment or valuation of its tangible properties in the State of Kentucky, and was, and is, without authority to consider the affidavit of Mr. M. H. Smith, or any other evidence relating to the physical valuation of petitioner's railroads for the purpose of fixing the value of petitioner's tangible property in Kentucky. Petitioner says that, under the laws of the State of Kentucky, it is for the Railroad Commission alone to correct and equalize valuations of the tangible properties of railroads in the State of Kentucky, and that the authority of the State Board of Valuation and Assessment is limited to the valuation and assessment of the franchise or intangible properties.

"5. Petitioner further says that the consideration of lines owned, leased, operated, and controlled, stated in the tentative assessment of

October 23, 1913, to have been given by the Board, is, in substance and effect, no consideration at all. Under the circumstances stated in said notice such consideration could have no effect whatever upon the result. Under the circumstances stated in said notice, the value of $70,000,000.00 would have been found by the Board as the value of petitioner's tangible property in the State of Kentucky whatever might have been the proportions of lines owned, leased, operated, or controlled in Kentucky and elsewhere.

"6. Petitioner further says that there are no facts shown by the evidence stated to have been considered by the Board, and there are no facts at all showing or tending to show that on the stock and bond plan or on any other plan the value of the capital stock of the
70 'operated roads belonging' to petitioner is in so large an amount as $226,000,000.00. Petitioner says that, on the stock and bond plan, the value of the capital stock pertaining to the roads operated by petitioner, whether belonging to petitioner or not, is a very much smaller amount than $226,000,000.00.

"7. Petitioner further says that, in making the tentative assessment set forth in the notice of October 23, 1913, the Board has not followed the opinion of Judge Cochran, and petitioner further says in this regard that the Board has not followed the opinion of Judge Cochran, with respect to giving notice of the calculations made by the Board or of the method or plan pursued by the Board in making its assessment.

"8. Petitioner denies the right or authority of this Honorable Board to consider the report of net income and gross income derived from business done in Kentucky, as shown by petitioner's report to the Railroad Commission of Kentucky as of date June 30, 1912, or by any other report. And petitioner says that said report to the Railroad Commission of Kentucky for the year ending June 30, 1912, is of no value for arriving at the value of or for assessing either petitioner's tangible property or petitioner's intangible property for taxation within the State of Kentucky.

"9. Petitioner denies that Judge Cochran's opinion provides either literally or in substance or effect for the distribution of property values, either tangible or intangible, between Kentucky and other States upon the basis of income, either gross or net. And petitioner says that no such distribution is contemplated by the laws of the State of Kentucky with reference to the assessment of the intangible properties or franchises of railroad corporations, operating along definite and fixed lines in and out of this State.

"10. The Board failed to deduct, as it should have done,
71 the value of all of petitioner's tangible property wherever situated, both in Kentucky and out of Kentucky, from the total value ascertained by the Board of its capital stock or its entire property, tangible and intangible, before apportioning to Kentucky its share for taxation of petitioner's intangible property or franchise, and the Board by the method it pursued in ascertaining the value of petitioner's intangible property or franchise for taxation in Kentucky for the year 1913 imported the value of petitioner's tangible property situated in States outside of Kentucky of the value of many mil-

lions of dollars and included the same in its alleged valuation and assessment of petitioner's intangible property in Kentucky.

"11. The Board failed to deduct the value of the tangible property in Kentucky as ascertained by the Board from the share of the total capital stock or the value of petitioner's entire property, tangible and intangible, in Kentucky, in ascertaining the value of the intangible property of petitioner in Kentucky, the Railroad Commission — of petitioner's tangible property in Kentucky made in 1912, thus leaving a large part of the value of petitioner's tangible property in Kentucky as ascertained by the Board, to-wit: $41,193,928, or the difference between $28,806,072 and $70,000,000, as fixed by the Board as the value of petitioner's tangible property in Kentucky as of June 30, 1912, as admitted by the Board and set forth in its notice to petitioner dated October 23, 1913, which sum of $41,193,928 was by the action of said Board as aforesaid unlawfully included in and made to form a part of the value as fixed by said Board of the intangible property of the petitioner in Kentucky as of June 30, 1912, for taxation in 1913, which method of valuation and assessment by said Board resulted in a plain and manifest attempt on its part, without warrant of law, to assess and tax the same tangible property of petitioner in Kentucky twice (first by the Railroad Com-
72 mission and second by the Board of Valuation and Assessment) or in a double valuation and assessment and double taxation to the extent of $41,193,928, included in said Board's assessment of petitioner's franchise.

"12. The Board admits by its said notice to petitioner dated October 23, 1913, that its valuation of all its intangible property in this State and out of this State is only $87,000,000, and the apportionment thereof to Kentucky on the mileage basis, is approximately only $22,000,000 in Kentucky, whereas it has, without warrant of law, as set forth in its said notice, fixed and assessed the intangible property of petitioner in Kentucky at $47,193,928, or many times greater than its real or fair cash value, estimated at what it would bring at a fair voluntary sale.

"13. The petitioner states the Board did not, as it claims in its said notice of October 23, 1913, to have done, make all or any necessary deductions from its valuation of petitioner's total capital stock or in its apportionment thereof to Kentucky, for the value of petitioner's non-taxable stocks in other corporations which have paid all taxes due from them or assessable against them upon their property located in the State of Kentucky, whether that property be realty, personalty, tangible or intangible, or franchise in nature, to which deductions the petitioner was and is entitled under the laws of this State, as decided by the Court of Appeals in the case of Commonwealth v. Fidelity Trust Co., 147 Ky. 77, and the value of which non-taxable stocks as hereinabove set forth was and is $30,761,799.35.

"14. The said Board did not, as it claims to have done in its said notice to this petitioner of October 23, 1913, equalize the property, tangible or intangible, of this Company in Kentucky so that it was not or would not be assessed by said Board any higher for

taxation than other property assessed by said Board or by the county assessors, the board of county supervisors or the State Board of Equalization. On the contrary, the said Board has for the
73 years 1912 and 1913 intentionally, habitually and purposely valued and assessed the intangible property or franchises of other public service corporations in this State at not exceeding 60% of the real or fair cash value (estimated at the price the same would bring at a fair voluntary sale), and said county assessors, boards of county supervisors and State Board of Equalization have intentionally, habitually and systematically valued and assessed farm lands, city and town lots and improvements thereon, as well as other property assessable by said officials and boards, for taxation in 1913 and many years prior thereto at not exceeding 60% of the real or fair cash value thereof (estimated at the price the same would bring at a fair voluntary sale), all of which was well known to said Board, and was and is in violation of the equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States.

"The value of the classes of property assessable as aforesaid by the county assessors, boards of county supervisors and the State Board of Equalization constituted (even at said low assessments thereof) in 1912, for the taxes of 1913 and for many years prior thereto at least 80% of the entire taxable property, tangible and intangible, in the State of Kentucky.

"Wherefore, Petitioner prays that the Board of Valuation and Assessment furnish to it or to its counsel information showing the principle upon which said Board proceeded and the mode or manner employed by it of estimating the value of petitioner's franchise, together with the details of the calculations involved in such estimate and assessment.

"Petitioner further prays that a reasonable time be set after such information has been furnished to petitioner, and that peti-
74 tioner, and its counsel, after the furnishing of such information, be accorded an investigation and hearing and be permitted to introduce evidence showing the errors which exist in the principles on which the Board proceeded, and in the calculations made by the Board in this regard, and in the method or manner employed by it in estimating the value of petitioner's franchise, and that said Board change and reduce the preliminary valuation and assessment of petitioner's franchise for taxation for the year 1913, and for all other appropriate relief.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By WILLIAM A. COLSTON,
ROBERT E. FLEMING,
HENRY L. STONE,
Attorneys for Petitioner."

All the allegations in said protest and petition were and are true.

XIII.

Thereafter, to-wit, on the 17th day of November, 1913, at a meeting of the State Board of Valuation and Assessment, held at its office in Frankfort, Ky., plaintiff appeared through counsel pursuant to said protest and petition filed by it, and it appearing that the Board of Valuation and Assessment was not then able to answer the questions propounded in said protest and petition, an adjournment of the hearing before said Board was had until November 20, 1913, to enable said Board to answer said questions. After said adjournment, to-wit, on November 18, 1913, John L. Rich, an attorney for said Board, addressed to H. L. Stone, plaintiff's General Counsel, a letter enclosing tentative answers to the
75 interrogatories propounded in plaintiff's said protest and petition; and at the commencement of the hearing before said Board on November 20, 1913, the Attorney General of the State of Kentucky, on behalf of said Board, withdrew said tentative answers and offered other answers to said questions prepared and signed by said Board. Said answers prepared and signed by said Board did not furnish any information showing the principle upon which said Board proceeded, or the mode or manner employed by it of estimating the value of plaintiff's franchise, or the details of the calculations involved in such estimate and assessment, as prayed in plaintiff's said protest and petition before said Board. And at said hearing before said Board on November 20, 1913, plaintiff objected that the responses to the interrogatories made by the Board were not sufficient or complete, and did not afford or furnish the information called for in the interrogatories. Being unable to secure any definite or sufficient response to said interrogatories, plaintiff, without waiving any of its rights to object to the failure to furnish or secure such information, proceeded under protest with a hearing of its protest and petition before said Board of Valuation and Assessment.

As a result of the failure and refusal of said Board to state the principle upon which it proceeded, or the mode or manner employed by it of estimating the value of plaintiff's franchise, plaintiff was denied a fair, full and impartial hearing or trial on the facts, or the opportunity to introduce material evidence, to which it was entitled, upon the question of the reasonableness of the assessment
76 made by said Board and the principles upon which it proceeded, or the mode or manner it adopted of estimating the value of its franchise. The refusal to answer said questions or to disclose the information therein called for operated as a fraud upon plaintiff in the matter of the final assessment of plaintiff's franchise thereafter made by said Board, and plaintiff was thus denied the equal protection of the laws; and if said final assessment is carried out and enforced, it will be deprived of its property without due process of law, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XIV.

After hearing evidence introduced by plaintiff, the said Board of Valuation and Assessment changed the valuation of plaintiff's franchise for taxation for the taxes of 1913 and under date of December 29, 1913, defendant, H. M. Bosworth, issued final written notice of the assessment of plaintiff's franchise for the taxes of 1913 in words and figures as follows, to-wit:

"Final Notice.

State of Kentucky,
Office of Auditor of Public Accounts.

"FRANKFORT, Dec. 29, 1913.

"To Louisville & Nashville R. R. Co., Lou., Ky.:

"The State Board of Valuation and Assessment have had the report of the above corporation for June 30, 1912, for the
77 taxes of 1913, under consideration, and have assessed the value of your Franchise as follows:

Capital stock	$75,159,402
Less amount of Tangible Property Assessed by Assessor for State Taxes	29,500,772
Value of franchise	$45,658,630
Tax at 50 cents on each $100	$228,293.15

"Under the law you will have thirty days in which to make payment to this office. Should you fail to remit before the thirty days expire, a penalty of 10 per cent and interest at the rate of 10 per cent will attach.

"Yours truly,
(Signed) H. M. BOSWORTH, *Auditor.*

"Make checks payable to state treasurer but mail to this office."

This notice was received by plaintiff on December 30, 1913. Said final notice reduces the assessment of plaintiff's total capital stock, or the value of plaintiff's entire properties, tangible and intangible, within the State of Kentucky, as shown in the preliminary or tentative assessment of said Board hereinabove referred to, less than 2 per cent, and the assessment of the value of plaintiff's franchise in the State of Kentucky for taxation for the year 1913, to-wit, at the amount of $45,658,630.00, as shown in said final notice, is excessive, unreasonable, unjust, illegal and arbitrary, as will hereinafter be more particularly shown, and if said assessment, and taxation based thereon, is enforced against plaintiff, plaintiff will be deprived
78 of its property without due process of law, and will be denied the equal protection of the laws, as will hereinafter be more particularly shown.

XV.

Plaintiff attaches hereto, in two volumes and exhibits, all marked "Exhibit A," and prays to be read as part hereof, a true and correct record of the testimony and proceedings before said Board of Valuation and Assessment at the hearings accorded plaintiff in this case. And plaintiff states that said final assessment of its franchise for taxes for the year 1913 in the State of Kentucky at, to-wit, the amount of $45,658,630.00, is an utterly unreasonable assessment, and can not be arrived at from a consideration of any facts or evidence introduced before or considered by said Board, and that said assessment is purely arbitrary and the result of the wanton abuse of discretion on the part of said defendants constituting said Board of Valuation and Assessment.

And plaintiff further says that said final assessment of its franchise by said Board was, and is, beyond the limits of the powers delegated to said Board by any laws of the State of Kentucky, or by any laws under which it assumes to act or may act, and that said final assessment, even if in form within the delegated powers of said Board, evidences so unreasonable and exorbitant an exercise of such powers that said assessment is in substance beyond the powers granted to or held by said Board.

79 XVI.

The said Board of Valuation and Assessment is one of the instrumentalities provided by the State of Kentucky for the purpose of raising the public revenue by way of taxation. In regard to plaintiff and other public service corporations, it is the duty of that Board to make an original assessment of their franchises or intangible property. From the decision of the Board in making such assessment no appeal is provided for, and such decision is final, except as proceedings for relief may thereafter be taken in the courts. Acting under the laws of the State, the said Board represents the State, and its action is the action of the State. Plaintiff therefore states that, inasmuch as said Board with respect to its action in valuing and assessing plaintiff's franchise or intangible property for taxation in the State of Kentucky proceeded upon erroneous principles and adopted an illegal and improper mode or manner of estimating such value, and reaching such assessment, and acted arbitrarily and fraudulently, as herein set forth, its action in these respects was and is the action of the State through said Board, and if carried out or enforced would violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, by depriving plaintiff of its property without due process of law, and by denying to it equal protection of the laws.

80 XVII.

Plaintiff says that the assessing and taxing authorities of the State of Kentucky systematically, habitually, intentionally and designedly

assess and have assessed the property of individuals and of corporations not required to report to said State Board of Valuation and Assessment for taxation in the State of Kentucky at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and at less than 60 per cent of said fair cash value estimated at the price it would bring at a fair voluntary sale, all of which was proven to said Board; but the assessment of plaintiff's franchise herein complained of is at far more than the full fair cash value of said franchise, and if said assessment of plaintiff's franchise is enforced plaintiff will be denied the equal protection of the laws of the State of Kentucky, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XVIII.

Plaintiff states the State Board of Valuation and Assessment, in valuing and assessing plaintiff's franchises or intangible property as herein complained of, discriminated against plaintiff and made said final assessment as of December 29, 1913 (of which plaintiff, through one of its attorneys, received notice by registered mail from the Auditor on December 30, 1913), at a different and higher rate or basis and by a different method from that which said Board em-
81 ployed at the same time for the assessment of the franchises or intangible property of other corporations of the same class for the year 1913, resulting in an enormous disparity and gross discrimination against plaintiff and between the various assessments of the franchise of intangible property of such corporations of the same class, whereby plaintiff was and is denied by the State of Kentucky, acting by and through said Board, the equal protection of the laws, in contravention of the provisions of Section One of the Fourteenth Amendment of the Constitution of the United States.

XIX.

Plaintiff further says that defendants constituting the State Board of Valuation and Assessment systematically and intentionally assessed for the year 1913, the property of other corporations required to report to said State Board of Valuation and Assessment at less than the fair cash value of said property of other corporations, estimated at the price it would bring at a fair voluntary sale, and at not more than 60 per cent of the real or true value of such property, and at not more than 60 per cent of the fair cash value of said property estimated at the price it would bring at a fair voluntary sale; but defendants constituting the State Board of Valuation and Assessment have assessed the value of plaintiff's property, with the assessment of which they are charged, at far more than the cash value of
82 said property estimated at the price it would bring at a fair voluntary sale, and at largely more than the real value of such property.

XX.

By Section 4091 of the Kentucky Statutes set out in paragraph IX hereof, it is provided in substance that all State taxes assessed against any corporation on its franchise or intangible property shall be due and payable thirty (30) days after notice of the same has been given said corporation by the Auditor, and all county, municipal, school and other taxes based on such assessment shall be due and payable thirty (30) days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every corporation failing to pay its taxes after receiving thirty days' notice shall be deemed delinquent, and a penalty of ten (10) per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten (10) per cent per annum. Said section furthermore provides that any corporation failing to pay its taxes, penalty, and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined fifty dollars ($50) for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin Circuit Court shall have jurisdiction.

The same provisions are to be found in Section 4103, Kentucky Statutes, with respect to railroad companies, set out in paragraph X hereof.

By Section 4104, Kentucky Statutes, it is provided that taxes, penalties, and interest due the Commonwealth from any rail-
83 road company may be recovered by the Auditor of Public Accounts by action in the name of the Commonwealth in the Franklin Circuit Court, and those due any county, city, incorporated town, or taxing district, may be recovered by the officer authorized to receive the same by action in the name of the Commonwealth in any court of competent jurisdiction.

Plaintiff further states that the defendant, H. M. Bosworth, Auditor of Public Accounts, is threatening to and will, unless enjoined and restrained herein from doing so, institute and prosecute actions in the name of the Commonwealth against plaintiff to recover the taxes, penalties, and interest thereon claimed to be due the Commonwealth upon said illegal assessment of plaintiff's franchise or intangible property. And the defendant, Bosworth, Auditor; the defendant, Likens, Assistant Auditor; the defendant, Garnett, Attorney General; the defendants, Morris, Logan and Hogan, Assistants of the Attorney General; the defendant, Bradley, Commonwealth's Attorney; and the defendant, Marshall, County Attorney, of Franklin County, will, unless enjoined and restrained herein from doing so, institute divers and sundry civil actions or cause the plaintiff to be numerously indicted in the name of the Commonwealth to recover the onerous fines of fifty dollars ($50) for each day plaintiff fails to pay the taxes, penalties, and interest claimed to be due and payable by plaintiff by virtue of said illegal assessment to the State and each of the several counties, cities, towns, and taxing districts wherein lines owned and operated by plaintiff are situated, such
84 failure for each day to pay to the State and to each county,

municipality, and taxing district taxes, penalties, and interest as aforesaid being claimed by said defendants to constitute separate and distinct misdemeanors under the statutes aforesaid.

Plaintiff further states that no plain, adequate, or complete remedy at law exists in its behalf, nor can it obtain such remedy or relief from the assessment herein complained of, except in equity; and unless it be immediately granted a temporary restraining order and an interlocutory injunction, and on final hearing a permanent injunction, against the enforcement of said assessment to the extent herein set forth, it will be subjected to a multiplicity of suits at law or by indictment in the Franklin Circuit Court which it seeks herein to prevent and avoid, and plaintiff will thereby suffer and sustain irreparable loss and damage.

Plaintiff further states that it has exhausted the remedy provided by law for a review of the assessment by said Board of Valuation and Assessment, and the defendant, Bosworth, as Auditor, regardless of the provisions of Section 4084, Kentucky Statutes, as set forth in paragraph IX hereof, and without waiting for the expiration of thirty days after the final determination of the values of the franchises of plaintiff and other railroads, as he was bound by said section to do, is threatening to immediately certify to the county clerks of the several counties through which plaintiff's lines extend, or where any portion of the corporate franchise of plaintiff is liable for taxation, the amounts thereof based on said exorbitant, fraud-
85 ulent and unlawful assessment liable for county, city, town, or district taxes. And unless an order be granted immediately restraining said defendant, H. M. Bosworth, from certifying any assessment, or any part of an assessment, which has been made or may be made of the franchise of plaintiff for taxation for the year 1913, in excess of the total amount of $22,899,200.00, on basis of which assessment of its franchise plaintiff has paid its State taxes and is willing to pay its local taxes due to counties, cities, towns, and taxing districts, said defendant, Bosworth, will immediately certify to the county clerks of the counties wherein any portion of the corporate franchise of plaintiff is liable for local taxation, the amounts based on the illegal, fraudulent, and exorbitant assessment herein complained of, for which plaintiff is supposed to be liable for county, city, town, or district taxes, and such certificates will be by each county clerk receiving the same filed in his office, and be by him certified to the collecting officers for the counties, cities, towns, and taxing districts for collection, and such officers will give notice of the amount of the tax claimed to be due in the several counties, cities, towns, and taxing districts based on the exorbitant, fraudulent and unlawful assessment herein complained of, and will claim that all county, city, municipal, school, and other taxes are due and payable thirty days after such notice based upon said illegal, exorbitant and fraudulent assessment has been given. And plaintiff will thus be subjected to the great annoyance and cost and injury of numerous suits and proceedings.

86 Plaintiff further states that unless restrained and enjoined from so doing the defendant, H. M. Bosworth, as Auditor, will

audit and enter in account as a demand payable at the treasury the amount of State tax claimed to be due upon the illegal, fraudulent and exorbitant assessment herein complained of, and will report to the Attorney General and cause proceedings to be instituted against plaintiff if plaintiff does not pay the amount of the tax based upon said unlawful, exorbitant and fraudulent assessment in excess of the amount which plaintiff has paid as the amount justly due from it to the Commonwealth.

Plaintiff further says that its road or some part of its line extends into or through sixty (60) counties in the State of Kentucky, and through numerous cities, towns, and taxing districts located in these counties.

Plaintiff further says that immediate and irreparable loss and damage will result to it before the matter can be heard on notice, unless a temporary restraining order shall be immediately granted restraining and enjoining defendants as in this bill hereafter prayed.

XXI.

Plaintiff further states that the amount of its franchise for the taxes of 1913, was assessed in said final notice of December 29, 1913, at $45,658,630.00

and that the taxes payable to the State of Kentucky on such a value (the State taxes being at the
87 rate of 50 cents on each $100) would amount to 228,293.15

And plaintiff states that its franchise in the State of Kentucky should not be assessed for taxation at a greater amount than 2,569,586.31

The details of the calculation according to which this amount of $2,569,586.31 is arrived at were shown in a statement marked "Exhibit Geo. W. Lamp No. 6," which was filed before said Board of Valuation and Assessment, and was and is true, and is in words and figures as follows, to-wit:

88 EXHIBIT GEO. W. LAMB, NO. 6.

Louisville & Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Property of the Louisville & Nashville Railroad Company, Tangible and Intangible, Within and Without the State of Kenucky, as Arrived at on the Basis of Value of Stocks and Bonds, for the Fiscal Year 1912; *Also the Value of Franchise or Intangible Property Apportionable to the State of Kentucky Arrived at by Deducting* (1) *the Value of Properties Separately Taxed in the State of Kentucky, and* (2) *the Value of Tangible Property Both Within and Without the State of Kentucky, Wherever Situated; Also Proportion of Such Franchise or Intangible Value Assignable to the State of Kentucky on Basis of the Percentage*

that Mileage Operated, Owned, Leased, or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased, or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of 60 per cent of its Real Value.

Total value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky		$227,035,292.84
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		30,761,799.35
		$196,273,493.49
89 Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky as assessed by Auditor of Public Accounts in his notice of June 28, 1913, ($28,806,072 raised to 100%, assuming assessed value to be 60% of real value)	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		$178,927,902.15
Value of L. & N. R. R. Co.'s franchise or intangible property, excluding values which are separately taxed in the State of Kentucky		17,345,591.34
Percentage which mileage operated, owned, leased, or controlled in the State of Kentucky bears to the total mileage operated, owned, leased, or controlled within and without the State of Kentucky		24.6901%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise or intangible property, at 100%		$4,282,643.85
90 Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise or intangible property, at 60%		2,569,586.85

But, with the purpose and intention of doing full equity, plaintiff is willing to submit to taxation of its franchise for 1913, at the assessment fixed for 1912, by the District Court of the United States for the Eastern District of Kentucky, as a condition of the granting of a temporary injunction in plaintiff's case against the defendants herein constituting the Board of Valuation and Assessment of the

State of Kentucky, and other defendants, known as No. 729, in equity in said Court. That is to say, with the purpose and intention of doing full equity (although plaintiff contends that it should not be required to submit to taxation of its franchise for 1913 at a greater assessment than..... $2,569,586.31) it is willing to submit to taxation of its franchise for 1913 at the amount of..... 22,899,200.00, on which assessment the amount of State taxes paid to the State of Kentucky is..... 114,496.00.

And plaintiff says that as to State taxes payable to the State of Kentucky, the amount in controversy in this case, without interest and costs, is the difference between the taxes which would be assessed under the excessive, unreasonable, unjust,
91 illegal and arbitrary final assessment of its franchise by said Board, or..... 228,293.15, and the amount which plaintiff has already paid on account of such taxes, to-wit..... 114,496.00; or, in other words, that the amount in controversy in this case as to State taxes payable to the State of Kentucky, without interest and costs, is.. 113,797.15, and is far in excess of the sum and amount of three thousand dollars ($3,000.00).

And plaintiff further says that the average rate of taxation paid by it on the assessed value of its properties for taxation in the State of Kentucky for the year 1912, on which taxes were paid, including the taxes paid the counties, towns, cities and taxing districts, was $1.50 on each $100.00 of valuation and assessment, of which rate of $1.50, fifty (50) cents represented taxes paid to the State of Kentucky, and one dollar ($1.00) represented taxes paid to counties, cities, towns and taxing districts.

And plaintiff further states that if the Auditor of Public Accounts of the State of Kentucky shall certify to the county clerks of the counties wherein the proportions of the corporate franchise of plaintiff are liable to local taxation the amounts of such franchise liable for county, city, town, or district taxes, plaintiff will be compelled to pay local taxes on the values of said franchise in
92 said counties, cities, towns, or taxing districts, at a rate in excess of the rate at which taxes are paid to the State of Kentucky; and plaintiff says that as to the taxes paid or to be paid to counties, cities, towns and taxing districts upon the assessed valuation of its franchises, the amount in controversy in this suit is at least $225,000.00, and is far in excess of the sum and amount of three thousand dollars ($3,000.00), exclusive of interest and costs.

XXII.

Plaintiff has tendered and offered to pay to the Auditor and Treasurer of the State of Kentucky the sum of $114,496.00, which is the amount plaintiff conceives to be, at the outside, due to said

State as taxes on the value of its franchise, and said amount has been accepted, but not as payment in full.

Plaintiff further says that it is advised and believes that the collecting officers of the counties, cities, towns and taxing districts are without authority to accept any part of the taxes on the value of plaintiff's franchise until the amount of such assessment apportioned to the jurisdiction of each collecting officer is certified by the Auditor or by the county clerk; but plaintiff states that it is willing and ready, if the court deems it proper so to do, to pay into court, for the benefit of the counties, cities, towns and taxing districts interested, the amount of taxes payable to such counties, cities, towns, or taxing districts upon an apportionment of a total value of plaintiff's franchise not exceeding said amount of $22,899,-200,00, in so far as the amount of such taxes based on such
93 total valuation of $22,899,200.00 may be approximated or determined by this court.

Plaintiff says it does not know, and has no knowledge or information sufficient to form a belief as to the rates levied for the taxes of 1913, by the respective counties, cities, towns and taxing districts in which the lines owned and operated by it are situated, but it is willing to pay the rates lawfully levied upon an apportionment of its franchise or intangible property assessable and taxable in the State of Kentucky, based on a total valuation of $22,899,200.00, at such times and in such manner as the court shall order, if the court shall be of the opinion that such payment can lawfully be made.

XXIII.

Plaintiff says that the method or plan pursued by the Board of Valuation and Assessment for fixing the value of plaintiff's franchise for taxation at $45,658,630,00, as shown in said final notice of December 29, 1913, which method or plan is set forth in an opinion and order of the Commission adopting said valuation, is as follows, to-wit:

In arriving at the basis for estimate of the total value of the capital stock or entire property of plaintiff, the Board claims to have considered:

(*a*) The cost of construction of road and equipment.
(*b*) The cost of reproduction thereof.
(*c*) The real value of its stocks and bonds; and
(*d*) The gross and net earnings thereof within and without the State of Kentucky.

94 And the Board further claims to have considered all other matters appertaining thereto, as shown by the proof, that would assist the Board in arriving at the fair cash value thereof, and that it adjudged and determined the fair cash value of the total capital stock of the Louisville & Nashville Railroad Company to be.....$262,252,566.00, and of this total value the Board assigned or apportioned to the State of Kentucky 35.15%, which it claimed to be the proportion of the capital stock in

Kentucky on the "mileage basis," and the amount so assigned by the Board to the State of Kentucky out of the total value of the capital stock was..... 92,181,776.00.
And then to this amount the Board arbitrarily added the amount of..... 2,318,224.00,
and so claims to have fixed and determined the value of Kentucky's proportion of plaintiff's entire capital stock to be ..... 94,500,000.00.

After having thus fixed, as claimed by said Board, the full or 100% value of Kentucky's proportion of plaintiff's entire capital stock, the Board alleges in its report and order fixing the value of plaintiff's franchise for assessment as follows:

"But, to be conservative, and out of an abundance of caution, to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this State,
95 the Board has considered less than 80% of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent, and it is now ordered that the value of the capital stock of the L. & N. Railroad Company in Kentucky for the year 1913, be fixed at $75,159,402.00,
which, in the opinion of the Board, is less than 80% of its fair cash value."

The amount of $75,159,402.00 so fixed by the Board as the value for taxation purposes of plaintiff's capital stock in the State of Kentucky is 79.5+% of the amount of $94,500,000.00 fixed and determined by the Board as the full value of Kentucky's proportion of plaintiff's entire capital stock, arrived at as hereinabove set forth. method of arriving at the assessment of plaintiff's franchise for taxa- That portion of the report and order of the Board which shows this tion for the year 1913, is in words and figures as follows, to-wit:

"In arriving at the basis for estimate of value of the capital stock of property of respondent, the Board has considered the cost of construction of road and equipment and cost of reproduction thereof, the real value of its stocks and bonds and the gross and net earnings thereof within and without Kentucky, and all other matters appertaining thereto as shown by the proof, that would assist the Board in arriving at the fair cash value thereof, and upon consideration of all the foregoing and
96 after hearing the argument of counsel for respondent, and after having taken time to thoroughly consider all matters brought out in the hearing, it is now adjudged and determined by the Board of Valuation and Assessment of Kentucky, that the fair cash value of the total capital stock of the L. & N. R. R. Co. is.....$262,252,566.00,

that the proportion of the capital stock in Kentucky on the mileage basis, 35.15, is..... 92,181,776.00,
but the Board found that the excess value in Kentucky over this sum as shown by the proportion of the capital stock in Kentucky on the gross income basis is 7,472,199.00,
and that the excess value found in Kentucky by using the net income ratio is..... 10,096,624.00.

"Following the plan suggested by Judge Cochran in his opinion recently handed down in the case of the L. & N. Railroad Company v. Bosworth on hearing for a preliminary injunction, we ascertained the excess value as follows: The entire value of the tangible property of the L. & N. R. R. Co., within and without Kentucky as shown by the report to the Auditor is ..... $177,038,113.00.
The total value of the capital stock as found by the Board is ..... 262,252,566.00.
From which deduct ..... 177,038,113.00.

And the value of the intangible property of the L. & N. Railroad within and without Kentucky is found to be ..... 85,214,453.00.
The mileage proportion of the tangible property 35.15 ..... 62,228,896.00.
97 The gross income proportion of the intangible property 38 ..... 32,421,492.00.
Value of capital stock in Kentucky..... $94,650,388.00.

"Therefore, the Board of Valuation and Assessment places the excess value in Kentucky over the value found on the mileage basis at $2,318,224, and fixes and determines the value of Kentucky's proportion of the entire capital stock of respondent at $94,500,000, but to be conservative, and out of an abundance of caution to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this State, the Board has considered less than 80 per cent of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent, and it is now ordered that the value of the capital stock of the L. & N. Railroad Company in Kentucky for the year 1913, be fixed at $75,159,402, which, in the opinion of the Board, is less than 80 per cent of its fair cash value, and from this sum there is deducted the assessed value of the tangible property, to-wit, $29,500,772, and the remainder, to-wit, $45,658,630, is adjudged to be the value of the franchise of the L. & N. Railroad Company in Kentucky subject to taxation for the year 1913.

"The roll being called upon the adoption of the foregoing order the members voted as follows:

H. M. Bosworth, Yes.
Thos. S. Rhea, Yes.
C. F. Crecelius, Yes.

"Therefore, Said order is adopted and the Auditor will certify the valuation as fixed and the Clerk will give complainant a copy of the order.

H. M. BOSWORTH, *Auditor.*

Attest:
CHAS. J. VEILING, *Secretary.*"

98 From the amount so fixed by the Board as the value of the capital stock of the Louisville & Nashville Railroad Company in Kentucky for the year 1913..... $75,159,402.00,
the Board deducted as the assessed value of tangible property, to-wit, the amount of..... 29,500,772.00,
and fixed the remainder, to-wit..... 45,658,630.00,
as the value of the franchise of the Louisville & Nashville Railroad Company in Kentucky subject to taxation for the year 1913.

Plaintiff says that said assessment of the value of its franchise in Kentucky subject to taxation for the year 1913, at the amount of..... 45,658,630.00
is excessive, unreasonable, unjust, illegal and arbitrary, for the following reasons in addition to the reasons which have been hereinabove set forth.

(1) Total Value.

The total value of $262,252,566.00 was arrived at by the Board of Valuation and Assessment by the following calculation, to-wit:

"Gross corporate income of the Louisville & Nashville Railroad System, as shown by Report to Kentucky Railroad Commission and to Interstate Commerce Commission (p. 39).... $18,052,905.12.

99 "Deduct for income of roads operated for account of owners, whose earnings are not available to the Louisville & Nashville Railroad Company, to-wit:

South & North Alabama	$1,401.708.00	
Glasgow Railroad	31,847.00	
Elkton & Guthrie Railroad Co...	6,049.00	
Total		1,439,604.00.
Balance		16,613,301.00.

"Deduct income from non-taxable securities (see Report to Railroad Commission, p. 39, see Report to Auditor)..... 878,147.00.
Balance..... 15,735,154.00.
"Total value of capital stock of L. & N. R. R. arrived at by capitalizing net income at 6%.... $262,252,566.00."

In the deduction for income from non-taxable securities, the Board failed to deduct income from stock of the Lexington & Eastern Railway Company amounting to $70,953.33, the income from which stock was included in the said gross corporate income of $18,052,905.00. The Lexington & Eastern Railway Company was separately taxed in the State of Kentucky, and the stock of said company in the hands of the Louisville & Nashville Railroad Company was not taxable in any way in the State of Kentucky.

The Board reduced the amount of deduction for income from non-taxable securities, or from property separately taxed in the
100 State of Kentucky, by the amount of $43,393.38, which amount represented a deficit from the operation of the Madisonville, Hartford & Eastern Railroad, but the Board has otherwise treated the Madisonville, Hartford & Eastern Railroad as a part of the System of the Louisville & Nashville Railroad, and not as a separately taxed property, and the Board's action in this regard is inconsistent.

The Board failed to include in said deduction for income from non-taxable securities the amount of the income or profit arising from the Wasioto & Black Mountain Railroad, $15,154.59. The entire capital stock of said Wasioto & Black Mountain Railroad is owned by the Louisville & Nashville Railroad Company, and said Wasioto & Black Mountain Railroad is separately taxed, and pays all its taxes due in the State of Kentucky. This item was shown to the Board in the hearing before it in a statement which was filed with said Board and marked "Exhibit Geo. W. Lamb No. 5."

Plaintiff states that the benefit to the Louisville & Nashville System arising from the ownership of stocks held by the Louisville & Nashville Railroad Company of other companies which are separately taxed in the State of Kentucky, and which are not again taxable against the Louisville & Nashville Railroad Company, is reflected, not only in the dividends from said stocks or in the earnings of the particular lines covered by said stocks, but also in the increased earnings and income of other portions of the Louisville & Nashville System arising from the affiliation with said System of the properties represented by said stocks. For example, traffic originating
101 or terminating on the Nashville, Chattanooga & St. Louis Railway, or reaching the lines of the Louisville & Nashville Railroad by way of the Nashville, Chattanooga & St. Louis Railway, passes over the Main Stem of the Louisville & Nashville Railroad between Louisville, Ky., and Nashville, Tenn., and over other divisions of the Louisville & Nashville System, both in the State of Kentucky and elsewhere, and the net earnings from said traffic over said division of the Louisville & Nashville Railroad Company are included in said corporate income of $18,052,905.00. And plaintiff accordingly says that the proper amount to be deducted from the total value of its capital stock for non-taxable securities held by it is the real value of said securities which is included in the total value of its capital stock or entire properties, regardless of the amount of income or dividend directly and specifically assigned to such securities. And plaintiff further says that it was shown to said Board by uncon-

tradicted evidence, and it is true, that the amount to be deducted from the total values of the capital stock of plaintiff because of stocks owned by plaintiff in corporations which are separately taxed in the State of Kentucky, and which pay taxes on all of their property of every kind in the State of Kentucky, and which are included in the total value of the capital stock or entire properties of the Louisville & Nashville Railroad Company, tangible and intangible, is more than ..... $30,761,799.35.

And plaintiff says that the error resulting from the deduction made by the Board instead
102 of the deduction which should have been made, amounts at least to the difference between $30,761,799.35,

which is less than the real value of said non-taxable securities, and the amount of $14,635,783.33;

which is the result of the capitalization at 6% of $878,147.00, income from non-taxable securities deducted by the Board, or, in other words that said error amounts to more than ..... $16,126,016.00.

Plaintiff further says that it is entitled to have the deduction of non-taxable securities owned by it made after, instead of before, the apportionment of the total value of its capital stock to the State of Kentucky, on a mileage basis. That is to say, it is entitled to have the value of said securities deducted from Kentucky's proportion of the total values instead of from the total values before apportionment is made.

Plaintiff further states that neither the operating expenses nor any other deductions from income used in arriving at the so-called net earnings or corporate income of $18,052,905.00 used by the Board include any allowance for insurance of the maintenance of plaintiff's income for the future, and that in view of this fact, and in view of the uncertainty and risk attending the operation of railroads in the territory traversed by plaintiff's lines, it is not fair or proper to capitalize plaintiff's income at so low a percentage as 6 per cent in order to arrive at the value of plaintiff's entire property, tangible and intangible, or in order to arrive at the value of plaintiff's total
103 capital stock, as that term is used in the revenue and taxation laws of the State of Kentucky. Plaintiff says that the legal rate of interest for investments with absolute security in a number of the States through which the plaintiff's lines extend, and in which said income of $18,052,905.00 was earned, is greater than 6 per cent. Plaintiff says that in consideration of this fact, and in view of the risks of the railroad business, the percentage used in capitalizing income for the purpose of arriving at the value of plaintiff's total capital stock should not be less than 8 per cent.

Plaintiff further says that on the basis of capitalization of income at 8 per cent the total value of the entire properties, tangible and intangible, of plaintiff within and without the State of Kentucky, in-

cluding the value of properties which are separately taxed in the State of Kentucky, and which are represented by stocks held by plaintiff, is not more than ..... $202,514,384.38.

Plaintiff further says that the best measure of the values of its entire properties, tangible and intangible, within and without the State of Kentucky for the purpose of assessment for taxation for the year 1913, is the real or market value of its stock and bonds for a considerable period preceding the time as of which the valuation is to be made, and that even if it be not proper to take the average values for a period of five or ten or more years, rather than the values for the year immediately preceding, the average values of
104 plaintiff's stock and bonds for the fiscal year ended June 30, 1912, should be taken as the measure of the total value of plaintiff's entire capital stock, rather than the earnings or income for said fiscal year as used by the Board. Plaintiff further says that the average market or real value of its stock and bonds for a period of five years past, or for any other considerable past period, is considerably less than the average market value of its stock and bonds for the year ending June 30, 1912, and that the total value of its entire properties, tangible and intangible, within and without the State of Kentucky, including the values of properties which are separately taxed in the State of Kentucky, as measured by the market or real value of its stock and bonds for the fiscal year ended June 30, 1912, was not more than ..... $227,035,292.84, and that from this amount there should be deducted for the value of non-taxable stocks held by the Louisville & Nashville Railroad Company, and included therein, not less than ..... 30,761,799.35, leaving as the amount of the total value of the entire properties, tangible and intangible, of plaintiff within and without the State of Kentucky, after deducting the value of non-taxable securities, not more than ..... 196,273,493.49.

105 (2) Apportionment to Kentucky.

The percentage used by the Board in apportioning to Kentucky its share of the value of plaintiff's total capital stock, 35.15 per cent, is not the proportion which the length of plaintiff's lines operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased, or controlled in this State and elsewhere, but is merely the proportion which the mileage operated by plaintiff in Kentucky, less mileage operated by plaintiff for account of owners in Kentucky, bears to the total mileage operated by plaintiff in Kentucky and elsewhere, less mileage operated by plaintiff for account of owners in Kentucky and elsewhere. The following is a resume of the mileage operated by plaintiff as of June 30, 1912, divided as between mileage in the State of Kentucky and mileage outside of the State of Kentucky, showing the deduction for mileage operated for account of owners necessary to arrive at the per-

centage of 35.15 percent used by the Board of Valuation and Assessment:

	Total.	In Kentucky.	Outside of Kentucky.
Owned and Operated	3,498.63	1,217.44	2,281.19
Operated as Owner of Entire Capital Stock	632.05	334.33	297.72
Operated under Lease	118.97	.....	118.97
Operated under Trackage Arrangement	217.04	16.24	200.80
Owned, Leased, Operated under Trackage Arrangement	5.46	.....	5.46
Owner of Entire Capital Stock, Property Operated Separately, Operated by Plaintiff under Trackage Arrangement	6.46	6.46	.....
Operated for Account of Owners	221.88	21.42	200.46
Total Mileage Operated	4,700.49	1,595.89	3,104.60
Deduct: Operated for Account of Owners	221.88	21.42	200.46
	4,478.61	1,574.47	2,904.14

106 1,574.47 miles so arrived at as mileage operated in Kentucky less mileage operated for account of owners in Kentucky is 35.15+ % of 4,478.61 miles, or the total mileage operated in Kentucky and elsewhere, less mileage operated for account of owners in Kentucky and elsewhere.

The mileage in Kentucky above shown, 1,574.47 miles, includes, however, mileage of roads separately taxed in the State of Kentucky, as follows:

Morganfield & Atlanta Railroad	25.33 miles
Madisonville, Hartford & Eastern Railroad	55.49 miles
Wasioto & Black Mountain Railroad	70.05 miles
Kentucky Highlands Railroad, Millville to Cliffside	6.46 miles
Total	157.33 miles

And eliminating this mileage, as well as the mileage operated for account of owners, from the mileage in Kentucky, the proportion of mileage operated by plaintiff in Kentucky to the total mileage operated by plaintiff in Kentucky and elsewhere less mileage operated for account of owners is 32.79%.

Plaintiff says that the correct percentage to be used in apportioning to Kentucky its share of the total value of plaintiff's capital stock is that proportion which the length of the lines operated, owned, leased, or controlled in Kentucky bears to the total length of the lines operated, owned, leased, or controlled in Kentucky and elsewhere, and plaintiff says that, as set forth in detail in paragraph I of this Bill, that proportion is 24.6901%.

107 Plaintiff says that the net earnings or income of $18,052,905.00 used by the Board of Valuation and Assessment in arriving at or estimating the total value of plaintiff's capital stock includes, among other items, amounts arising from the following mileages operated, owned, leased, or controlled by plaintiff, which were not included or considered by said Board in its said calculations, to-wit:

	Total.	In Kentucky.
Nashville, Chattanooga & St. Louis Railway.	925.01	8.23
Central Transfer Railway & Storage Company	.67	.67
Georgia Railroad and Dependencies	571.00	.....
Chicago, Indianapolis & Louisville Railway.	616.60	.....
Louisville, Henderson & St. Louis Railway.	181.44	181.44
Lexington & Eastern Railway.....	96.11	96.11
New Orleans, Mobile & Chicago Railroad..	547.06	.....
Total.....	2,937.89	286.45

Plaintiff further says that said amount of net earnings or corporate income, $18,052,905.00, used by the Board of Valuation and Assessment in arriving at or estimating the total value of plaintiff's capital stock includes net income arising from business originating or terminating on said lines owned, operated, leased, or controlled by plaintiff, whose mileage was not included or con-
108 sidered by said Board, which business so originating or terminating on said lines not included passed over the lines operated by plaintiff, and resulted in net income or earnings on and from plaintiff's operated mileage.

And plaintiff further says that, in like manner, said net earnings or corporate income of $18,052,905.00 included net earnings or income accruing on the lines operated by plaintiff but arising from business originating or terminating on lines operated for account of owners, the mileage of which lines operated for account of owners was not included or considered by the Board. For example, the net earnings or corporate income of $18,502,905.00 includes net earnings accruing on plaintiff's operated mileage and arising from business originating or terminating on the South & North Alabama Railroad, and these net earnings arise and accrue to plaintiff from the affiliation and connection of the South & North Alabama Railroad as part of the Louisville & Nashville System.

The so-called mileage percentage used and considered by the Board of Valuation and Assessment was..... 35.15%

The percentage which represents the proportion which the length of plaintiff's lines operated, owned, leased, or controlled in Kentucky bears to the total length of the lines operated, owned, leased, or controlled by plaintiff in Kentucky and elsewhere, and which plaintiff says should have been used and considered by the Board, is..24.6901%

109 (3) Deductions to be Made Before Apportionment.

Plaintiff says that before apportioning any part of the total value of plaintiff's capital stock or of the entire value of plaintiff's properties, tangible and intangible, to the State of Kentucky, the Board of Valuation and Assessment should have deducted from said total value of all properties, tangible and intangible, the value of tangible properties both within and without the State of Kentucky, and the intangible or franchise values only should have been apportioned to Kentucky in the proportion which the length

of the lines operated, owned, leased or controlled by plaintiff in the State of Kentucky bears to the total length of the lines operated, owned, leased or controlled by plaintiff in Kentucky and elsewhere. Plaintiff says that the amount of its tangible properties within and without the State of Kentucky to be so deducted is at least .....$178,927,902.15.

Plaintiff further states that it is entitled to deduct from the total value of its entire properties, tangible and intangible, within and without the State of Kentucky, before apportionment, the real values of properties included in said total values which are separately taxed in the State of Kentucky. Plaintiff says, in fact, it is entitled to deduct the real value of said separately taxed properties from the values apportioned to Kentucky alone, and that it is certainly entitled to so deduct the value of separately taxed properties from the values apportioned to Kentucky alone if apportionment is
110 made to Kentucky before the value of plaintiff's tangible properties within and without the State of Kentucky is deducted from the total value of plaintiff's properties, both tangible and intangible, wherever situated.

Plaintiff further says that by reason of the failure of the Board of Valuation and Assessment to deduct from the total value of plaintiff's entire properties, tangible and intangible, wherever situated, the value of plaintiff's tangible properties within and without the State of Kentucky before apportioning any part of the total values to the State of Kentucky, the said Board largely increased, without power or lawful authority so to do, the share or value apportionable to Kentucky, and included in the assessment of the supposed franchise or intangible property of plaintiff herein complained of large values of tangible property located and situated outside of the State of Kentucky, and not taxable therein, either under the guise of franchise or intangible property, or otherwise. And plaintiff says that should the said assessment be allowed to become final, it would be taxed in the State of Kentucky on the value of a large and material part of its tangible property situated in other States and taxed there, and would thereby be deprived of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

111 (4) Arbitrary Addition to Amount Apportioned by the Board to the State of Kentucky.

Plaintiff says that the addition of $2,318,224.00 made by the Board to the already excessive amount of $92,181,776.00 apportioned by the Board to the State of Kentucky, as aforesaid, was arbitrary and capricious, and without warrant of law. Plaintiff states that said Board of Valuation and Assessment is without authority to make any addition to any amount apportioned on a mileage or other basis to the State of Kentucky out of the total value of plaintiff's capital stock, or out of the total value of plaintiff's properties, tangible and intangible, wherever situated.

And plaintiff charges that said addition of $2,318,224.00 was an

arbitrary and capricious addition, not based upon any calculation or investigation or method, and was made merely for the purpose of bringing the already exorbitant apportionment to the State of Kentucky of $92,181,776.00 up to the further arbitrary, capricious, exorbitant and unlawful apportionment of $94,500,000.00. And plaintiff states that there were and are no facts of record before said Board of Valuation and Assessment, and there are no facts at all, justifying or supporting, or tending to justify or support, an apportionment out of the total value of plaintiff's capital stock to the State of Kentucky in any such amount as $94,500,000.00, or in any amount approximating that amount.

112 (5) Equalization.

The Board of Valuation and Assessment claims to have equalized for assessment purposes the fair cash value of Kentucky's proportion of plaintiff's entire capital stock as found by the Board at about 80 per cent. Plaintiff says that the assessing and taxing authorities in Kentucky habitually, generally, systematically, intentionally and designedly assess for taxation property of individuals and of corporations at less than 60 per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale, and that the assessment of plaintiff's franchise at more than 60 per cent of its fair cash value will result in denying to plaintiff the equal protection of the laws of the State of Kentucky, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XXIV.

Plaintiff further says that said defendants constituting said Board of Valuation and Assessment are falsely and fraudulently pretending to have made said excessive, unreasonable, unjust, illegal and arbitrary assessment of $45,658,630.00 after having considered the cost of construction of road and equipment, and the cost of reproduction thereof, the real value of plaintiff's stocks and bonds and the gross and net earnings thereof within and without the State of Kentucky, and all other matters appertaining thereto, as shown by the proof, that would assist the Board in arriving at the fair cash
113 value thereof, and upon consideration of all the foregoing, and after hearing the argument of counsel for plaintiff, and after having taken time to thoroughly consider all matters brought out in the hearing.

And plaintiff further says that it is impossible for said defendants constituting the Board of Valuation and Assessment of Kentucky to have reasonably arrived at the final assessment of the value of plaintiff's franchise at $45,658,630.00, made by them, from a consideration of the things and matters which they claim to have considered. Plaintiff says that said assessment is the result merely of capricious, unauthorized, arbitrary and unlawful action on the part of said defendants, and is the result, without warrant or color of law, of a fraudulent attempt on the part of said defendants to deprive plain-

tiff of its property without due process of law, and to deny to it the equal protection of the laws.

And plaintiff further says that if the said defendants constituting said Board of Valuation and Assessment did, as they claim to have done, consider the gross and net earnings or the real or supposed gross and net earnings of plaintiff in the State of Kentucky in ascertaining or estimating and fixing the value of plaintiff's franchise for taxation in the State of Kentucky, said defendants acted without authority and contrary to law in that regard, and said assessment is unauthorized and unlawful, and should be declared void on that account.

Plaintiff further states that if said defendants constituting said Board of Valuation and Assessment of Kentucky considered,
114 as they claim to have done, the gross or net earnings, real or supposed, of plaintiff within the State of Kentucky, and the amount of the assessment of plaintiff's franchise was in any way affected by such consideration, then said defendants not only acted without warrant or authority of law, but in fact attempted to tax and place a burden upon the gross and net earnings of plaintiff within the State of Kentucky, which said earnings are principally earnings in interstate traffic; and the effect and substance of said defendants' action in this regard is to tax the right to carry on interstate commerce in the State of Kentucky, and to burden and regulate commerce with foreign nations and among the several States, the sole power to regulate which commerce with foreign nations and among the several States is by the Constitution of the United States given to the United States Congress.

Plaintiff further states that the said defendants, constituting the State Board of Valuation and Assessment of Kentucky, at the time of making their assessment, herein complained of, did not have any knowledge or information sufficient to enable them to determine what were either the gross or net earnings of plaintiff within the State of Kentucky.

Defendants, constituting said Board of Valuation and Assessment of Kentucky, claim to have considered in arriving at the gross and net earnings of plaintiff in the State of Kentucky, and in arriving at the *p*ercentages which the gross and net earnings of plaintiff in the State of Kentucky bear respectively to the gross and net earnings of plaintiff in Kentucky and elsewhere, the annual report made
115 by plaintiff to the Kentucky Railroad Commission for the fiscal year ended June 30, 1912. Plaintiff says that it was shown without contradiction to said Board of Valuation and Assessment, and it is true, that the amounts of gross earnings and the amounts of net earnings shown in said report to the Kentucky Railroad Commission are the results of arbitrary apportionments both of earnings and of expenses, and the amounts of gross earnings in Kentucky, the amounts of expenses in Kentucky, and the amounts of net earnings in Kentucky of plaintiff shown in said report of plaintiff to the Kentucky Railroad Commission are not reliable for the purposes for which the Board claims to have used such amounts, and said report to the Kentucky Railroad Commission, with respect both

to gross earnings of plaintiff in Kentucky and net earnings of plaintiff in Kentucky, is of no value for assessment or valuation purposes, and it is of no value in arriving at the amounts of plaintiff's gross or net earnings in the State of Kentucky, or the relative amounts of such earnings as compared with the amounts of gross or net earnings of plaintiff over its entire system.

Neither of said reports of gross earnings, net earnings, or expenses, which the said Board claims to have considered, was intended to be used for assessment purposes by said Board, but said reports were made for -poses of comparison for the use of the plaintiff between the results of its operations for the fiscal year ended June 30, 1912, and the results of operations of previous years, and the same are
116 not accurate statements of the gross and net earnings of the plaintiff nor were they intended to be, as fully explained in the testimony at the hearing before said Board concerning the assessment of plaintiff's franchise for the year 1913.

XXV.

Plaintiff further says that during the 1912 session of the General Assembly of the Commonwealth of Kentucky, extending through the months of January and February and to about the middle of March, 1912, it was insistently and publicly announced by the State authorities of the State of Kentucky that said State was in debt about one and a half million dollars and that provision of some kind must be made to increase the revenues of the State in order to take care of said debt or deficit and to pay during the present State administration the amounts provided by the Confederate Pension Act and divers and sundry appropriations passed at said session of the General Assembly of the Commonwealth of Kentucky.

The last platform of the Democratic party, adopted in Louisville prior to the State election of 1911, declared in favor of a bill creating a public utilities commission. The Democratic candidates for State offices were successful at said election held for State offices in 1911, and thereafter, as provided by the present Constitution of the Commonwealth of Kentucky, the Honorable James B. McCreary, Democrat, as Governor elect, defendants, H. M. Bosworth, Democrat, as Auditor of Public Accounts, Thomas S.
117 Rhea, Democrat, as Treasurer, C. F. Crecelius, Democrat, as Secretary of State, James Garnett, Democrat, as Attorney-General of the State, and other successful candidates, to-wit, on the first Monday in January, 1912, entered upon their official duties. A bill providing for a public utilities commission was introduced at said 1912 session of the General Assembly of the Commonwealth of Kentucky, and in support of t' bill it was urged that the State was very heavily in debt, and that by the creation of a public utilities commission the taxation of the public service corporations of the State could be materially increased and the revenues of the State increased accordingly. The passage of said bill providing for a public utilities commission would have affected and abridged or destroyed the in-

fluence, power, and authority of said defendants, H. M. Bosworth, Thomas S. Rhea, and C. F. Crecelius, as constituting said Board of Valuation and Assessment of Kentucky, and defendant H. M. Bosworth vigorously opposed the passage of the bill and represented to the members of the Legislature that the State's necessities could and would be taken care of by the Board of Valuation and Assessment without the necessity of creating a public utilities commission. The public utilities bill was defeated, and thereafter the assessed values of the franchise of public service corporations in the State of Kentucky were by said defendants, constituting said Board of Valuation and Assessment, unreasonably, exorbitantly and fraudulently raised. The purposes for which the increases in the assessed values of the franchise of the public service corporations were made are
118 indicated in the following extract from a reported interview with the Governor relative to the public utilities bill, which appeared in the Courier-Journal, a newspaper published at Louisville, Ky., on March 7, 1912, which report was published as a communication from Frankfort, Ky., under date of March 6, 1912, and was signed by Claud W. Perry, to-wit:

"Governor McCreary, when asked for an opinion to-night as to the action of the House in killing the bill, said:

" 'The last Democratic platform, adopted at Louisville, declared in favor of a public utilities bill. It was believed that many corporations in the State were not assessed as high as they should be assessed, and therefore were not paying as much tax as they should pay. Thirty-five States in the United States have public utilities laws, and Ohio, Wisconsin and Minnesota notably have raised large amounts to help pay the debts respectively of those States. The State of Kentucky is in debt several hundred thousand dollars, and I know that at the time the Democratic platform was adopted in Louisville it was stated by many that with a good public utilities law, assessing property and taxing properly and justly the corporations of the State, the debt of the State could be materially reduced, if not removed.

" 'Members of the Legislature, wishing to perform the pledge made in the Democratic platform, therefore offered the public utilities bill, which was voted down today; they said that it would be much better to tax corporations fairly and justly than to increase the State tax, which is now 50 cents on the $100, or to issue bonds in order to pay the State's indebtedness. They said also that individual property was now taxed high enough, and it would be fair and just to have a Commission composed of first-class, intelligent gentle-
119 men, who would assess and provide for the taxation of corporations in a fair and just manner;' "

and by the following extract from an article which appeared in the Courier-Journal, a newspaper of Louisville, Ky., and other Kentucky papers, on April 12, 1912, to-wit:

"Kentucky's indebtedness will be wiped out in the next three years and the burden of taxation lifted from the people as a result of the action of the State Board of Valuation and Assessment, composed of Henry Bosworth, Auditor, Chairman, Dr. C. F. Crecelius,

Secretary of State, and Thomas Rhea, State Treasurer, today in increasing more than $137,000,000 the assessment on franchises of the railroads and other corporations of the State. The State will receive in taxes nearly $700,000 more than was received last year from this one source and when the Board completes the assessment of all public utility corporations it is believed that these corporations will pay to the State a total of nearly $1,000,000 more than they paid last year.

"One result of the action of the Board today will be to do away with any necessity for any extra session of the Legislature to pass a public utility bill or take some other steps looking to the raising of money to meet claims.

"The deficit can now be wiped out without any further legislation, and it is believed that there will be no further talk of an extra session.

"It is said that the action of the Board upon all matters considered at the meeting was unanimous."

* * * * * * *

"At the rate of 50 cents on the $100 the increased assessment will produce to the State the sum of approximately $685,000, and
120 since it is not likely that there will be a decrease to any appreciable extent during the subsequent three years of the administration, or for that matter, beyond the life of this administration, it is figured that the Commonwealth can be freed of her debt and her burden of taxation upon the people equalized."

Further along the writer of the article quotes a prominent attorney as discussing the action of the Board, as follows:

"This bill (The Public Utilities Bill) was intended to take away the power of the present Board to fix these franchise assessments. Governor McCreary was persuaded that it was absolutely necessary to secure sufficient revenue to meet the appropriations that were made, and to wipe out the indebtedness as he earnestly desired.

"The fight to pass the biil was a strenuous one. It was charged upon the floor of the General Assembly that Bosworth would not have the courage to raise the assessment against the wishes of the railroads.

"Every conceivable bit of intrigue was played against him in the attempt to weaken him, but he stood firm, the utilities bill was defeated and today after an enforced delay because of the fight through the Legislature, Bosworth with the aid of his associates made good his promises to the Legislature and the people."

Plaintiff further says that said article appearing in the Courier-Journal and other papers on April 12, 1912, was given to the press in the following manner, to-wit:

The State Board of Valuation and Assessment on April 11, 1912, gave to the press figures as to the tentative franchise assessments of plaintiff and other public service corporations for 1912, and
121 Mr. Thomas B. Cromwell, the Lexington correspondent of the Cincinnati Enquirer, was called to Frankfort by Mr. Justus Goebel, Adviser to the State Board of Valuation and Assessment, and upon information given by said Goebel prepared the article

which was given to the press with the tentative figures on April 11, 1912, the article appearing in the Courier-Journal and other papers on April 12th.

None of said defendants, H. M. Bosworth, C. F. Crecelius, and Thomas S. Rhea, has at any time denied or corrected any of the matter which appeared in the Courier-Journal and other Kentucky papers on April 12, 1912, as stated above, but on the contrary, said defendants and each of them have acquiesced in the correctness and truthfulness of said statements and in the correctness and truthfulness of similar statements published in other newspapers concerning the object and purposes of their said assessments from the date of their publication up to the present time.

And plaintiff states that the assessment of its franchise for taxation for the year 1912 was falsely and fraudulently made by the defendants constituting the Board of Valuation and Assessment at the amount of $45,428,074.00 for the purpose of securing and maintaining political rights, powers, privileges and profits for their personal benefit and advantage, and in fraud and denial of plaintiff's rights under the law; and said unlawful assessment for 1912 is now in litigation in this court.

And plaintiff states that the assessment of its franchise for taxation for 1913, now complained of, as shown by said final notice
122 of December 29, 1913, at the amount of $45,658,630.00, is likewise a false and fraudulent assessment, made by defendants constituting said Board of Valuation and Assessment for the purpose of securing and maintaining political rights, powers, privileges and profits for their personal benefit and advantage, and in fraud and denial of plaintiff's rights under the law.

And plaintiff further says that said fraudulent and unlawful assessment, even if made under the forms of law, is beyond the authority and power of said defendants, as constituting said Board of Valuation and Assessment, and is the result of an unreasonable and fraudulent abuse of the power vested in said Board by law, and said fraudulent assessment, if enforced against plaintiff, will result in the taking of plaintiff's property without due process of law and in a denial of the equal protection of the laws, in violation of the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States.

The premises considered, and to the end that plaintiff may not be subjected to the false claims and may not be annoyed by the suits, indictments, attachments and distraints which may be instituted, and that it may be spared the irreparable injury which it will otherwise suffer, and that its property shall not be subjected to bear an illegal and unjust burden, and that its right to proper and just taxation may be vindicated, and that it may be relieved from the burdens imposed by the illegal and fraudulent acts complained of, plaintiff prays for a writ of subpœna against the said defendants, H.
123 M. Bosworth, Thomas S. Rhea, and C. F. Crecelius, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky; H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky; G. B. Likens, Assistant

Auditor of Public Accounts of the State of Kentucky; James Garnett, Attorney-General of the State of Kentucky; C. H. Morris, First Assistant Attorney-General of the State of Kentucky; M. M. Logan, Second Assistant Attorney-General of the State of Kentucky; O. S. Hogan, Third Assistant Attorney-General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court; and W. C. Marshall, County Attorney of Franklin County, of the State of Kentucky; to appear and make full and true answer to this bill, but not under oath, answer under oath being hereby expressly waived; and that an injunction pendente lite be granted commanding said:

H. M. Bosworth, Thomas S. Rhea, and C. F. Crecelius, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, and said H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and said G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, to refrain from apportioning or attempting to apportion to counties, cities, towns, or taxing districts, any assessment of plaintiff's franchise for taxation in the State of Kentucky for the year 1913 based upon a greater total assessment or value of said franchise than $22,899,200.00; and commanding:

124 Said H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and said G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, to refrain from certifying any assessment or value of plaintiff's franchise for taxation in the State of Kentucky for the year 1913 in excess of $22,899,200.00, and from certifying any part of any assessment or value of plaintiff's franchise in excess of said amount to the county clerk of any county in the State of Kentucky in which plaintiff's lines are situated, or to any other officer;

And commanding:

Said H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and said G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, to refrain from entering in account as a demand payable at the Treasury of the State any amount of taxes based on any assessment of plaintiff's franchise for taxation for the year 1913 in the State of Kentucky at a greater total amount than $22,899,200.00; and to refrain from making any report to the Attorney-General of any alleged delinquency arising from the failure of plaintiff to pay taxes to the State of Kentucky based on any assessment of its franchise for taxation in the State of Kentucky for 1913 at a valuation greater than the aforesaid amount; and to refrain from causing proceedings of any kind to be instituted against plaintiff because of the failure or refusal of plaintiff to pay taxes on its franchise in Kentucky for the year 1913 based on an assessment of total value in excess of the aforesaid amount; and commanding:

125 The said H. M. Bosworth, G. B. Likens, James Garnett, C. H. Morris, M. M. Logan, O. S. Hogan, Victor A. Bradley, and W. C. Marshall, to refrain from instituting or prosecuting any proceedings against plaintiff, either by indictment or civil action, to

recover taxes or penalties because of any alleged delinquency of plaintiff in failing to pay taxes based upon an assessment or valuation of its franchise for taxation in the State of Kentucky at any greater value than the amount aforesaid;

And that upon final hearing a decree be made establishing the right of plaintiff to be taxed on an equality with the individual citizens of the State, and in a manner which will not result in compelling plaintiff to bear an improper proportion of the burdens of government, and that said defendants be perpetually enjoined from apportioning or certifying any assessment made of plaintiff's franchise based upon any valuation in excess of the amount aforesaid, and from collecting or enforcing any taxes or penalties because of any alleged delinquency of plaintiff in failing to pay taxes based upon any higher assessment of its franchise; and that plaintiff may have such further or other relief in the premises as the nature of the circumstances of this case may require, and as to the court shall seem meet.

HENRY L. STONE,
HELM BRUCE,
EDWARD S. JOUETT,
WILLIAM A. COLSTON,
ROBERT E. FLEMING,
Solicitors.

126 STATE OF KENTUCKY,
County of Jefferson, ss:

W. L. Mapother says that he is First Vice President of plaintiff, the Louisville & Nashville Railroad Company, and that the statements contained in the foregoing bill of complaint are true.

(Signed) W. L. MAPOTHER.

Subscribed and sworn to before me by W. L. Mapother, this 23d day of January, 1914.

(Signed) G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

My commission expires January 24, 1914.

(Signed) G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

127 And on the same day, towit, January 23, 1914, a motion was filed herein, same being in words and figures as follows, viz:

In the District Court of the United States for the Eastern District of Kentucky.

In Equity.

No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,

v.

H. M. BOSWORTH, THOMAS S. RHEA, and C. F. CRECELIUS, Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky; H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky; G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky; James Garnett, Attorney General of the State of Kentucky; C. H. Morris, First Assistant Attorney General of the State of Kentucky; M. M. Logan, Second Assistant Attorney General of the State of Kentucky; O. S. Hogan, Third Assistant Attorney General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, and W. C. Marshall, County Attorney of Franklin County, of the State of Kentucky, Defendants.

Motion for Preliminary Injunction.

Now comes the Louisville and Nashville Railroad Com-
128 pany, plaintiff in the above entitled suit, by Helm Bruce, Henry L. Stone, Edw. S. Jouett, Robert E. Fleming, and W. A. Colston, plaintiff's solicitors, and moves this Honorable Court to grant a writ of injunction against said defendants and each of them, their agents, attorneys, clerks, servants, and employes pending this suit and until the further order of the court conformable to the prayer of the bill in this case filed.

HENRY L. STONE.
HELM BRUCE.
W. A. COLSTON.

EDWARD S. JOUETT.
ROBERT E. FLEMING.

129 And on a day following, towit, on January 24, 1914, an order was made and entered herein, same being in words and figures as follows:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,

v.

H. M. BOSWORTH et al., Defendants.

Plaintiff, upon the filing of its bill herein, moved the court to grant an injunction pendente lite in accordance with the prayer of its bill, and said motion is now fixed for hearing on the 31st day of January, 1914, at ten o'clock A. M. at Chambers in the city of

Maysville, Kentucky, and it having been made to appear by the averments of plaintiff's bill and the exhibits therewith filed as parts thereof that there is danger of irreparable loss or damage being caused plaintiff before the hearing of said application for a writ of injunction pendente lite can be had unless the defendants herein are, pending said hearing, enjoined and restrained as set forth in the prayer of the plaintiff's bill.

It is now, therefore, ordered that a temporary restraining order be and the same is hereby granted, and that the defendants, H. M. Bosworth, Thomas S. Rhea and C. F. Creselius, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, and the defendant, H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and the defendant, G. B. Likens, Assistant Auditor of Public Accounts of the
130 State of Kentucky, are specially restrained and enjoined from apportioning or attempting to apportion to any counties, cities, towns or taxing districts any assessment of plaintiff's franchise for taxation in the State of Kentucky for the year 1913, based upon any greater total assessment or value of said franchise than $22,899,200.00.

And the defendant, H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and the defendant G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, are specially restrained and enjoined to refrain from certifying any assessment or value of plaintiff's franchise for taxation in the State of Kentucky for the year 1913 in excess of $22,899,200.00, and are specially restrained and enjoined from certifying any part of any assessment or value of plaintiff's franchise out of any total amount in excess of said sum to the county clerk of any county of the State of Kentucky in which plaintiff's lines are situated or to any other officer.

And the defendants, H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, are especially restrained and enjoined from entering in account as a demand payable at the treasury of said State any amount of taxes based on any assessment of plaintiff's franchise for taxation for the year 1913 in the State of Kentucky at a greater amount than $22,899,200.00, and are specially restrained and enjoined from making any report to the Attorney General of the State of Kentucky of any alleged delinquency arising from the failure of plaintiff to pay taxes
131 to the State of Kentucky based on any assessment of its franchise for taxation in the State of Kentucky for 1913, at a valuation greater than the aforesaid amount, and are specially restrained and enjoined from causing proceedings of any kind to be instituted against plaintiff because of the failure or refusal of plaintiff to pay taxes on its franchise in Kentucky for the year 1913, based on an assessment of total value in excess of the aforesaid amount.

And the defendants, H. M. Bosworth, G. B. Likens, James Garnett, C. H. Morris, M. M. Logan, O. S. Hogan, Victor A. Bradley

and W. C. Marshall are specially restrained and enjoined from instituting or prosecuting or causing to be instituted or prosecuted any proceedings against plaintiff, either by indictment or civil action, because of any alleged delinquency or failure to pay any taxes, penalty, or interest on any assessment or valuation of its franchise for taxation in the State of Kentucky at any greater value than the amount aforesaid.

This restraining order is to remain in full force and effect until the hearing and determination of plaintiff's motion for an injunction pendente lite herein and until the further order of this court in the premises.

132 And on a day following, to-wit, February 6, 1914, an agreement was filed herein, same being in words and figures as follows, viz;

In the District Court of the United States for the Eastern District of Kentucky.

In Equity.

No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,

v.

H. M. BOSWORTH, THOMAS S. RHEA, and C. F. CRECELIUS, Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky; H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky; G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky; James Garnett, Attorney General of the State of Kentucky; C. H. Morris, First Assistant Attorney General of the State of Kentucky; M. M. Logan, Second Assistant Attorney General of the State of Kentucky; O. S. Hogan, Third Assistant Attorney General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, and W. C. Marshall, County Attorney of Franklin County, of the State of Kentucky, Defendants.

Agreement Between Counsel to Submit Motion for a Temporary Injunction upon the Pleadings, Exhibits, and Affidavits Without Argument.

133 It is agreed between the parties and between counsel for plaintiff and counsel for defendants herein that, in view of the fact that the questions of law involved in the plaintiff's motion for a temporary injunction have been recently argued by the same counsel in this Court in the cas- of Louisville & Nashville Railroad Company, Complainant, versus H. M. Bosworth, et al., defendants, in equity Number 729, the plaintiff's motion for a temporary injunction in the present case shall be submitted without argu-

ment upon the pleadings, exhibits, and affidavits filed by the parties herein.

JAMES GARNETT,
Attorney General of the State of Kentucky and Counsel for Defendants Herein.
WILLIAM A. COLSTON,
Counsel for Plaintiff, Louisville & Nashville Railroad Company.

134 And on a day following, towit, on February 20th A. D. 1914, an order was made and entered herein, same being in words and figures as follows, viz;

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This cause came on to be heard, after due notice to defendants, upon plaintiff's motion for a temporary injunction and upon the pleadings, exhibits, and affidavits filed by the parties herein, and it was agreed between counsel for plaintiff and counsel for defendant that the questions of law involved in the motion having been recently argued in this court by the same counsel, plaintiff's present motion for a temporary injunction should be submitted upon the pleadings, exhibits, and affidavits filed by the parties, and thereupon, upon consideration thereof, the court being sufficiently advised, it was ordered, adjudged and decreed as follows, viz;

1. That the plaintiff, Louisville & Nashville Railroad Company be and it is hereby granted a temporary injunction in accordance with its said motion and the prayer of its bill of complaint. This injunction is granted, however, upon the condition that complainant will pay to the counties, cities, towns and taxing districts the amount of taxes due on the valuation of $22,899,200.00 within thirty
135 days from this date and the Auditor is permitted to certify to the said counties, cities, towns and taxing district- the amount due on the valuation aforesaid.

2. That the defendants, H. M. Bosworth, Thos. S. Rhea, and C. F. Crecelius, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, and H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, are enjoined and commanded to refrain from apportioning or attempting to apportion to counties, cities, towns or taxing districts any assessment of plaintiff's franchise for taxation in the State of Kentucky for the year 1913, based upon a greater total assessment or value of said franchise than $22,899,200.00.

3. That said H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and said G. B. Lykins, Assistant Auditor of Public Accounts of the State of Kentucky, are enjoined and commanded to refrain from certifying any assessment or value of plaintiff's franchise for taxation in the State of Kentucky for the year

1913 in excess of $22,899,200.00, and from certifying any part of any assessment or value of plaintiff's franchise in excess of said amount to the county clerk of any county in the State of Kentucky, in which plaintiff's line- are situated, or to any other officer.

4. That said H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky, and said G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, are enjoined and commanded to refrain from entering an account as a demand payable at the treasury of the State any amount of taxes based on any as-
136 sessment of plaintiff's franchise for taxation for the year 1913 in the State of Kentucky at a greater total amount than $22,899,200.00 and to refrain from making any report to the Attorney General of any alleged delinquency arising from the failure of plaintiff to pay taxes to the state of Kentucky based on any assessment of its franchise for taxation in the State of Kentucky for 1913 at a valuation greater than the aforesaid amount, and to refrain from causing proceedings of any kind to be instituted against plaintiff because of the failure or refusal of plaintiff to pay taxes in Kentucky for the year 1913, based on an assessment of total value in excess of the aforesaid amount.

5. And that defendants, H. M. Bosworth, G. B. Likens, James Garnett, C. H. Morris, M. M. Logan, O. S. Hogan, Victor A. Bradley and W. C. Marshall, are enjoined and commanded to refrain from instituting or prosecuting any proceedings against plaintiff either by indictment or civil action to recover taxes or penalties because of any alleged delinquency of plaintiff in failing to pay taxes based upon an assessment or valuation of its franchise for taxation in the State of Kentucky at any greater value than the amount aforesaid.

6. That this temporary injunction shall be and remain in full force and effect until the further order of the court herein.

7. That to all of the foregoing order the defendants and each of them are given an exception.

137 And on a day following, towit, on February 28, 1914, a motion was filed herein, same being in words and figures as follows, viz:

District Court of the United States for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,

v.

H. M. BOSWORTH, etc., Defendants.

Motion for Time to File Answer.

Came the defendants and move this Honorable Court to give time until April 1, 1914, to file answer herein.

For reason the defendants say that they have been engaged in the preparation of answer in suit filed by this complainant against H. M. Bosworth, etc., enjoining the 1912 assessment made by the State

Board of Valuation and Assessment, and that they are now engaged in preparing said case for trial and their time is so taken up in said preparation that they cannot properly prepare an answer before the date above mentioned.

For further grounds, the defendants say that the bill herein is unusually long and that the preparation of the answer will require much time.

JAMES GARNETT,
Att'y General.
M. M. LOGAN,
Assist. Att'y General.

138 And on the same day, towit, on February 28th A. D. 1914, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

On motion of the defendants in the above entitled case, their time for filing answer in said case, is now and hereby extended until April 1, 1914.

139 And on a day following, towit, March 10, 1914, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

By agreement of the respective parties in the foregoing case, by their attorneys, it is now continued until April 16, 1914, at 9:30 A. M.

140 And on a day following, towit, on March 30, 1914, an answer was filed herein, same being in words and figures as follows, viz:

In the District Court of the United States in and for the Eastern District of Kentucky.

In Equity.

No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
versus
H. M. BOSWORTH, THOMAS S. RHEA, and C. F. CRECELIUS, Individually and as Constituting the Board of Valuation and Assessment

of the State of Kentucky; H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky; G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky; James Garnett, Attorney-General of the State of Kentucky; C. H. Morris, First Assistant Attorney-General of the State of Kentucky; M. M. Logan, Second Assistant Attorney-General of the State of Kentucky; O. S. Hogan, Third Assistant Attorney-General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, and W. C. Marshall, County Attorney of Franklin County, of the State of Kentucky, Defendants.

141 *Answer.*

I.

The defendants for answer to the first paragraph of plaintiff's bill of complaint, say that the statements contained therein are substantially correct, except that the defendants deny that the total mileage of road owned, leased, or controlled by plaintiff as of June 30, 1912, in the State of Kentucky and elsewhere was 7,907.83 miles or any other number of miles except as was shown by the evidence introduced before the Board of Valuation and Assessment which evidence is made a part of plaintiff's bill and will show for itself. As to the proportion that the lines operated, owned, leased or controlled bears to the total length of the lines operated, owned or controlled, the statements in the bill and the evidence introduced before the Board which is made a part of the bill will best show, but the defendants deny that the proportion which the lines operated, owned, leased or controlled in the State of Kentucky is only 24.6901% of the total length of the lines operated, owned or controlled in the State of Kentucky and elsewhere.

II.

For answer to the second paragraph of plaintiff's bill the defendants state that the allegations therein are substantially true.

142 III.

For answer to the third paragraph of plaintiff's bill the defendants state that the allegations therein are substantially true.

IV.

For answer to the fourth paragraph of the plaintiff's bill the defendants state that the allegations therein are substantially true.

V.

For answer to the fifth paragraph of plaintiff's bill the defendants state that the allegations therein are substantially true.

VI.

For answer to the sixth paragraph of plaintiff's bill the defendants deny that this suit arises under the Constitution and laws of the United States, or that this suit is brought to redress and prevent the deprivation under color of several statutes of the State of Kentucky of certain rights and immunities secured to plaintiff by the Constitution of the United States, or the right to have and enjoy its property without being deprived thereof without due process of law, or without being denied the equal protection of the laws, and they deny this suit involves the question as to whether or not certain assessments and taxations sought to be made and imposed by defendants with respect to the franchise of plaintiff interfere with, bur-
143 den, obstruct, or regulate commerce with foreign nations or among the several States.

VII.

For answer to paragraph seven of plaintiff's bill the defendants deny that the assessing and taxing authorities of the State of Kentucky including the defendants, systematically, habitually, intentionally or designedly assessed or have assessed the property of individuals or other corporations for taxation in the State of Kentucky at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, or that defendants have intentionally or fraudulently assessed the property of plaintiff, or its franchise, at more than its fair cash value or at as much as its fair cash value, estimated at the price it would bring at a fair voluntary sale, with the result that if taxation is enforced upon the assessment made by defendants, plaintiff will be compelled to pay on its property a higher rate of taxation than is paid by its individual property or a higher rate of taxation than is paid by other corporate property in the State of Kentucky, or taxes will not be uniform, or substantially uniform, within the State, or will not be uniform, or substantially uniform, within the territorial limits of the counties, cities, towns or taxing districts in the State of Kentucky, or that plaintiff will be denied the equal protection of the laws guaranteed to it by the Constituion of the United States, particularly by Section 1, Article 14 of the
144 amendments to said Constitution. Defendants deny that the taxing or assessing authorities of the State of Kentucky including defendants, habitually, generally, intentionally or systematically interpret the laws of the State of Kentucky which require that property shall be assessed at its fair cash value, as meaning with respect to the property of individuals or natural persons, that property shall be assessed at an amount different or less than its actual value, or that they assess the property of individuals and natural persons accordingly; and they deny that defendants have assessed the property of plaintiff, or its franchise at more than, or as much as, its fair cash value as such phrase is generally, habitually, intentionally and systematically interpreted by the assessing authorities of the State of Kentucky including the defendants or at more than its fair cash

value, or at as much as its fair cash value, or that they have deprived plaintiff of the equal protection of the laws of the State of Kentucky.

VIII.

For answer *of* the eighth paragraph of plaintiff's bill the defendants deny that the Legislature of the State of Kentucky has recognized the property in Kentucky is not generally assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale, or its actual value, and as to the sections of the Kentucky Statutes quoted by plaintiff in its bill in this paragraph they will best show what they contain, and said sections are referred to as to whether or not they are correctly copied in plaintiff's bill.

145 The defendants deny that the reports of the proceedings of the State Board of Equalization show, or that it is a fact, that the assessing or taxing authorities in Kentucky habitually, generally, intentionally or designedly assessed for taxation the property of individuals and of corporations not required to report to the Board of Valuation and Assessment at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and at less than its actual value.

As to what is shown by the reports of the proceeding- of the State Board of Equalization of Kentucky for the session of 1910, 1911, 1912 and 1913, the reports themselves are the best evidence, and they will show whether or not they are correctly copied in plaintiff's bill.

As to whether the equalized value of the property equalized by the State Board of Equalization for the year 1913 is only $12,000,000.00 more than the equalized value of the property equalized by said Board for the year 1912, the reports of said Board for said years will best show.

As to what the report of the State Tax Commission appointed by a resolution of the General Assembly at its 1912 session shows in regard to the report of the State Board of Equalization for 1911, the report of the State Tax Commission is the best evidence of what it contains.

IX.

For answer to paragraph nine of plaintiff's bill the defendants say that Section 182 of the Constitution of Kentucky will show as

146 to whether same is correctly quoted in plaintiff's bill, and that Sections 4077, 4078, 4079, 4080, 4081, 4082, 4083, 4084, 4085, 4086, 4087, 4088, 4089, 4090 and 4091, Kentucky Statutes, will best show whether or not they are correctly copied in plaintiff's bill.

Defendants deny that under color of said statutes or upon an unreasonable, capricious or fraudulent assessment pretended to have been made thereunder, defendants are threatening or attempting to, or unless enjoined or restrained by this Honorable Court, will deprive

plaintiff of its property without due process of law or in denial of equal protection of the laws.

X.

For answer to paragraph ten of plaintiff's bill the defendants say that Sections 4096, 4097, 4098, 4099, 4100, 4101, 4102, 4103 and 4104, Kentucky Statutes, they themselves will best show as to whether they are correctly quoted in plaintiff's bill.

XI.

For answer to paragraph eleven of plaintiff's bill the defendants say that Sections 144, 145, 152, 4686, 4695, 112-15, 118, 122, 127, Kentucky Statutes, will best show as to whether they are correctly quoted in plaintiff's bill.

XII.

For answer to paragraph twelve of plaintiff's bill the defendants say that the notice given plaintiff as to the assessment of its
147 property for the year 1913, which notice bears date October 13, 1913, is the best evidence as to what it shows, and that same will show whether it is correctly quoted in plaintiff's bill.

As to the protest and petition made by plaintiff for a change and reduction of said assessment and valuations of its franchise for taxation in the State of Kentucky for the year 1913 which was filed on November 14, 1913, said protest and petition is the best evidence of what it shows, and same will show whether it is correctly copied in plaintiff's bill.

The defendants deny that all the allegations in said protest and petition were, or are, true.

XIII.

For answer to paragraph thirteen of plaintiff's bill the defendants admit that at the hearing before the Board on November 20, 1913, the Board submitted to plaintiff's counsel answers to certain interrogatories that had been theretofore propounded to the Board, but the defendants deny that said Board did not furnish any information showing the principle upon which said Board proceeded or the mode or manner employed by it in estimating the value of plaintiff's franchise or the details of the calculation involved in such estimate and assessment as prayed for in plaintiff's said protest and petition to said Board. They deny that the plaintiff was unable to secure a definite or sufficient response to said interrogatories, and they
148 deny that without waiving any of its rights to object to the failure to furnish or secure such information plaintiff proceeded under protest with the hearing of its protest and petition before said Board of Valuation and Assessment. Defendants deny that as the result of any failure or refusal of said Board to state the principle upon which it proceeded or the mode or the manner employed

by it of estimating the value of plaintiff's franchise, plaintiff was denied a fair, full or impartial trial, or trial on the facts, or the opportunity to introduce material evidence to which it was entitled upon the question of the reasonableness of the assessment made by said Board or the principles upon which it proceeded, or the mode or manner it adopted to estimate the value of its franchise. Defendants deny that said Board refused to answer said questions or to disclose the information therein called for, and they deny that any such refusal operated as a fraud upon plaintiff in the matter of the final assessment of plaintiff's franchise thereafter made by said Board, or that plaintiff was thus denied the equal protection of the laws, or that if said final assessment is carried out, it will be deprived of its property without due process of law in violation of the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

XIV.

For answer to paragraph fourteen of plaintiff's bill, the defendants say that the final notice of the assessment of plaintiff's franchise is the best evidence of what it shows, and that same will show
149 whether or not it is correctly quoted in this paragraph of plaintiff's bill, and that same will further show the amount of reduction made from the preliminary or tentative assessment. They deny that the amount at which the assessment of plaintiff's franchise was fixed by the Board in said final notice, to-wit, $45,658,630, is excessive, unreasonable, unjust, illegal or arbitrary, or that if said assessment or taxation based thereon is enforced against plaintiff, that plaintiff will be deprived of its property without due process of law, or will be denied the equal protection of the laws.

XV.

For answer to paragraph fifteen of plaintiff's bill, the defendants deny that the final assessment of plaintiff's franchise for taxes for the year 1913 in the State of Kentucky at the amount aforesaid is an utterly unreasonable assessment, or unreasonable at all, or that same cannot be arrived at from a consideration of any facts or evidence introduced before or considered by said Board, or that said assessment is purely arbitrary, or the result of the wanton abuse of discretion or any abuse of discretion on the part of said defendants constituting said Board of Valuation and Assessment. They deny that said final assessment of plaintiff's franchise by said Board was or is beyond the limits of the powers delegated to said Board by any laws of the State of Kentucky, or by any laws under which it assumes to act or may act, or that said final assessment evidences any unreasonable or exorbitant exercise of such powers to the extent
150 that said assessment is in substance beyond the powers granted to or held by said Board.

XVI.

For answer to paragraph sixteen of plaintiff's bill, the defendants deny that inasmuch as said Board, with respect to its action in valuing and assessing plaintiff's franchise or intangible property for taxation in the State of Kentucky, proceeded upon an erroneous principle or adopted an illegal or improper mode or manner of estimating such value or reaching such assessment, or acted arbitrarily or fraudulently, that its action in these respects was and is the action of the State through said Board, or if carried out or enforced would violate the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States by depriving plaintiff of its property without due process of law; and the defendants deny that said Board proceeded upon erroneous principles or adopted illegal or improper methods of estimating such value or reaching such assessment, or acted arbitrarily or fraudulently, but they aver that said Board acted strictly under the laws of the State of Kentucky governing the assessment of plaintiff's franchise, and that the mode or manner of estimating the value of plaintiff's franchise was that provided by the laws of Kentucky.

XVII.

For answer to paragraph seventeen of plaintiff's bill the defendants deny that the assessing and taxing authorities of the State
151 of Kentucky systematically, habitually, intentionally or designedly assessed or have assessed the property of individuals and of corporations not required to report to said State Board of Valuation and Assessment for taxation in the State of Kentucky at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, or at less than 60 per cent of its said fair cash value estimated at the price it would bring at a fair voluntary sale, or that any such alleged facts were proven to said Board; and they deny that the assessment of plaintiff's franchise herein complained of is *at* far more or any more, or as much as the full, fair cash value of said franchise, or that if said assessment of plaintiff's franchise is enforced, plaintiff will be denied the equal protection of the laws of the State of Kentucky in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The defendants say that if it should be true that other taxing authorities of the State of Kentucky have failed to assess property at its fair cash value estimated at the price it would bring at a fair voluntary sale, as provided by the Constitution and laws of Kentucky, that this Board is no nowise bound thereby, and that it is the duty of this Board under the law to assess the property of plaintiff at its fair cash value estimated at the price it would bring at a fair voluntary sale.

152 XVIII.

For answer to paragraph eighteen of plaintiff's bill the defendants deny that the Board of Valuation and Assessment in valuing and

assessing plaintiff's franchise or intangible property discriminated against plaintiff or made said final assessment at a different or higher rate or basis, or by a different method from that which said Board employed at the same time for the assessment of the franchises or intangible property of other corporations of the same class for the year 1913, resulting in an enormous disparity or gross discrimination, or any discrimination against plaintiff or between the various assessments of the franchises or intangible property of such corporations of the same class, or the plaintiff was thereby or is thereby denied by the State of Kentucky, acting by and through said Board, the equal protection of the laws in contravention of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XIX.

For answer to paragraph nineteen of plaintiff's bill the defendants deny that the State Board of Valuation and Assessment systematically or intentionally assessed for the year 1913 the property of other corporations required to report to said State Board of Valuation and Assessment at less than the fair cash value of said property of other corporations estimated at the price it would bring at a fair
153 voluntary sale, or at not more than 60 per cent of the real or true value of such property, or at not more than 60 per cent of the fair cash value of such property estimated at the price it would bring at a fair voluntary sale, or that said Board has assessed the value of plaintiff's property at far more than the cash value of said property, or any more or as much as the cash value of said property estimated at the price it would bring at a fair vountary sale, or at largely more than the real value of such property, or any more than the real value of such property, or as much as the real value of such property.

XX.

For answer to paragraph twenty of plaintiff's bill the defendants say that the provisions of Sections 4091, 4103 and 4104 of the Kentucky Statutes will best show what is contained therein. They deny that the taxes, penalties or interest due upon the assessment of plaintiff's franchise or intangible property made by said Board for the year 1913 are illegal. They further state that no suits will be instituted and no penalties demanded by any of the officers set out in this paragraph representing the Commonwealth of Kentucky if the plaintiff should pay the taxes due as shown by said assessment. They deny that no plain, adequate or complete remedy at law exists in plaintiff's behalf, or that it can not obtain such remedy or relief from the assessment herein complained of, except in equity, and they state that it is entitled to no such relief as is claimed in the bill, and that
154 it should not be permitted to maintain an action either at law or in equity because the assessment and the taxes due thereon are legal and made in strict conformity to the laws of Kentucky. They deny that the Auditor, regardless of the provisions of Section

4084 of the Kentucky Statutes, or without waiting for the expiration of thirty days after the final determination of the value of the franchise of plaintiff and other railroads, is threatening or was threatening to immediately certify to the county clerks of the several counties through which plaintiff's line extends, or where any portion of the corporate franchise of plaintiff is liable for taxation, the amounts thereof based on said assessments, and they deny that said assessments are exorbitant, fraudulent or unlawful, or that the amount of taxes based thereon is illegal, fraudulent or exorbitant, or that the assessments are unlawful, and that for this reason they state that the plaintiff could not be subjected to the great annoyance and cost and injury of numerous suits and proceedings if such certification should be made, because the certification would be proper and no suits would be instituted if the taxes, which are legal and just, should be paid as required by law. They deny that the taxes due the State of Kentucky on the assessment are illegal, fraudulent or exorbitant, or that the assessment is illegal, fraudulent or exorbitant, or that the taxes are unlawful, exorbitant or fraudulent, as to the amount in excess of the amount which plaintiff has paid as the amount claimed by it to be justly due from it to the Commonwealth, but they admit that the amount claimed is in excess of the amount paid by plaintiff.

155 XXI.

For answer to paragraph twenty-one of plaintiff's bill the defendants say that the judgment of the Board fixing the final assessment of plaintiff's franchise for the year 1913 is the best evidence as to the amount at which it was fixed, and a copy of said judgment, record or exposition of reasons made by the Board in fixing said assessment is filed herewith and made a part hereof marked "Exhibit No. 1," and that same also will show the correct amount of taxes due the State of Kentucky based upon such an assessment. The defendants deny that plaintiff's franchise in the State of Kentucky could not be assessed for taxation at a greater amount than $2,569,586.31. And aver that it can not be assessed legally at any less amount than $45,658,630. As to the exhibit filed before the Board on the hearing granted to plaintiff, marked "Exhibit George W. Lamb No. 6," said exhibit will best show what is contained therein, and as to whether or not same is correctly quoted in plaintiff's bill. The defendants deny that with the purpose or intention of doing full equity, plaintiff is willing to submit to taxation on its franchise for 1913 at the assessment fixed for 1912 by the District Court of the United States for the Eastern District of Kentucky as a condition of granting a temporary injunction in plaintiff's case against the defendants herein constituting the Board of Valuation and Assessment of the State of Kentucky, and other defendants, known as No.

156 729 in equity in said court, or with the purpose or intention of doing full equity, it is willing to submit to taxation of its franchise for 1913 on an assessment of $22,899,200; but the defendants state that the plaintiff is willing to submit to this amount as an assessment because plaintiff well knows that it is far less than

the amount at which the assessment should be fixed for taxation. The defendants deny that the amount of taxes due on said assessment, to-wit, $228,293.15, is based upon an excessive, unreasonable, unjust, illegal or arbitrary assessment, but it is admitted by the defendants that the plaintiff has paid of said sum $114,496, and that there is a balance yet due the State of Kentucky of said sum of $113,797.15.

XXII.

For answer to paragraph twenty-two of plaintiff's bill the defendants state that the allegations therein contained are substantially correct, except that the plaintiff does not conceive it to be a fact that $114,496 at the outside is the amount due the State of Kentucky on the value of its franchise for the year 1913.

XXIII.

For answer to paragraph twenty-three of plaintiff's bill, the defendants say that the final notice of the assessment made by the Board of Valuation and Assessment of date December 29, 1913, will best show as to whether the deductions made therefrom by plaintiff and set out in this paragraph are correct. The defendants deny that the Board arbitrarily added to the assessment $2,318,224,
157 or any other sum. They deny that the assessment of plaintiff's franchise in Kentucky for the year 1913 at the sum of $45,658,630, is excessive, unreasonable, unjust, illegal or arbitrary for the reasons given in this paragraph of plaintiff's bill, or for any other reasons. The defendants deny that in the deduction for income from non-taxable securities the Board failed to deduct income from stock of the Lexington & Eastern Railway Company, amounting to $70,953.33, and they deny that said sum was income from stock, but they state that said income was interest on bonds of the Lexington & Eastern Railway Company held by plaintiff, and that bonds of corporations separately taxed in Kentucky are not exempt from taxation in the hands of plaintiff. As to the Madisonville, Hartford & Eastern Railroad Company and the Wasioto & Black Mountain Railroad Company, the defendants say that the said Board considered these roads as an integral part of the plaintiff's system. Therefore, the income and profits arising from these roads was not deducted from the total corporate income of plaintiff. The defendants deny that the benefit to the Louisville & Nashville Railroad system arising from the ownership of stocks held by said railroad system of other companies which are separately taxed in the State of Kentucky, and which are not again taxable against the plaintiff, is reflected in the increased earnings and income of other portions of the plaintiff's system arising from the affiliation with said system of the properties represented by said stocks, and they deny that the illustration given by plaintiff in this paragraph
158 in relation to the Nashville, Chattanooga & St. Louis Railway is an apt or proper illustration, or in any way tends to show the value of the stock owned by plaintiff in said Nashville, Chatta-

nooga & St. Louis Railway. They deny that the proper amount to be deducted from the total value of plaintiff's capital stock for non-taxable securities held by it is the real value of said securities which is included in the total value of its capital stock or entire properties, regardless of the amount of income or dividend directly and specifically assigned to such securities. They deny that it was shown to said Board by uncontradicted evidence, or that it was true that the amount to be deducted from the total value of the capital stock of plaintiff because of stocks owned by plaintiff in corporations which are separately taxed in the State of Kentucky, and which pay taxes on all of their property of every kind in the State of Kentucky, or which are included in the total value of the capital stock or entire properties of the Louisville & Nashville Railroad Company, tangible and intangible, is more than $30,761,799.35, or is as much as said sum, or is any more than $14,635,783.33; and they deny that there was any error resulting from the deduction made by the Board of said non-taxable securities as set out in this paragraph of plaintiff's bill, and they deny that the Board failed to deduct of such non-taxable securities the sum of $16,126,016, or any other sum which should have been deducted. The defendants deny that plaintiff is entitled to have the deduction of non-taxable securities owned by it made after instead of before the apportionment of the total value of its capital stock to the State of Kentucky on a mileage
159 basis, or that said non-taxable securities should be deducted from Kentucky's proportion of the total values instead of the total values before apportionment is made.

The defendants deny that neither the operating expenses nor any other deduction from income used in arriving at the net earnings or corporate income of $18,052,905 used by the Board include any allowance for insurance or the maintenance of plaintiff's income for the future, or that in view of this fact, or in view of the uncertainty and risk attending the operation of railroads in the territory traversed by plaintiff's lines, or for any other reason, it is not fair or proper to capitalize plaintiff's income at so low a percentage as 6% in order to arrive at the value of plaintiff's entire property, tangible and intangible, or in order to arrive at the value of plaintiff's total capital stock as that term is used in the revenue and taxation laws of the State of Kentucky, and they deny that the percentage used in capitalizing income for the purpose of arriving at the value of plaintiff's total capital stock should not be less than 8 per cent, or that the percentage used should be in any sum greater than 6 per cent. The defendants say that if, on the basis of capitalization of income at 8 per cent, the total value of the entire properties of plaintiff, tangible and intangible, within and without the State of Kentucky, amounts to $202,514,384.38, the same income capitalized at 6 per cent would amount to more than $270,000,000, and the Board has not fixed the total capital stock of plaintiff at an amount sufficiently large, but the defendants deny
159½ that the capitalization of the total net income at 8 per cent, including the value of properties which are separately taxed in the State of Kentucky, will not amount to exceeding $202,514,-

384.38, but they say that if the net income, including the income from stocks held in Kentucky corporations separately taxed is capitalized at 8 per cent, that the amount will be much in excess of said sum. The defendants deny that the best measure of the values of plaintiff's entire properties, tangible and intangible, within and without the State of Kentucky, for the purpose of assessment for taxation for the year 1913 is the real or market value of its stocks and bonds for a considerable period preceding the time as of which the valuation is to be made, or that it is proper to take the average value for a period of five or ten or more years, or the average value of plaintiff's stocks and bonds for the fiscal year ending June 30, 1912, should be taken as the measure of the total value of plaintiff's entire capital stock rather than the earnings or income for said fiscal years as used by the Board. Defendants deny that the average market value or the real value of plaintiff's stock and bonds for a period of five years past, or for any other considerable past period is considerably less than the average market value of its stocks and bonds for the year ending June 30, 1912, or that the total value of its entire property, tangible and intangible, within and without the State of Kentucky, including the value of properties which are separately taxed in the State of Kentucky as measured by the market or real value of its stocks and bonds for the fiscal
160 year ending June 30, 1912, was not more than $227,035,-292.84, and they deny that the average market value of the stock and bonds *are* conclusive evidence as to the value of plaintiff's capital stock, and they deny that there should be deducted from the amount of plaintiff's capital stock the sum of $30,761,799.35 as the value of non-taxable stocks held by plaintiff in other corporations of Kentucky which are separately taxed, or that after deducting such securities as are non-taxable that the value of plaintiff's capital stock as a whole is not more than $196,273,493.49.

The defendants deny that the percentage used by the Board in apportioning to Kentucky its share of the value of plaintiff's total capital stock is not the proportion which the length of plaintiff's lines operated, owned, leased or controlled in this State bears to the total length of lines operated, owned, leased or controlled in this State and elsewhere, or that the percentage so used is merely the proportion which the mileage operated by plaintiff in Kentucky less mileage operated by plaintiff for account of owners in Kentucky bears to the total mileage operated by plaintiff in Kentucky and elsewhere, less mileage operated by plaintiff on account of owners in Kentucky and elsewhere; but the defendants state that the percentage used by the Board in apportioning to Kentucky its part of the value of plaintiff's total capital stock is the true and correct proportion that the lines of road operated, owned, leased or controlled in Kentucky bears to the total length of lines operated, owned, leased or controlled in
161 this State and elsewhere as said expression is used in the Kentucky Statutes. As to the resume of the mileage operated by plaintiff as of June 30, 1912, divided as between mileage in the State of Kentucky and mileage outside of the State of Kentucky showing the deductions for mileage operated for account of owners necessary

to arrive at the percentage of 35.15 per cent used by the Board of Valuation and Assessment, the defendants say that the proof and exhibits filed before said Board, as well as the report of plaintiff to the Interstate Commerce Commission and the Kentucky Railroad Commission will best show whether said resume is correct. The defendants say that it is true that in the mileage of plaintiff's road credited to Kentucky going to make up the 1,574.47 miles, there is included the mileage of the Morganfield & Atlanta Railroad, Madisonville, Hartford & Eastern Railroad, Wasioto & Black Mountain Railroad, Kentucky Highland Railroad, Millville to Cliffside, and that the Board found from the evidence before it that these roads were an integral part of plaintiff's railroad system. The defendants deny that the correct proportion between mileage operated, owned, leased or controlled in Kentucky and mileage operated, owned, leased or controlled in Kentucky and elsewhere belonging to plaintiff's system is 24.6901 per cent, or any percentage other than 35.15 per cent.

The defendants deny that the net earnings or income of $18,052,905, used by the Board of Valuation and Assessment in arriving at or estimating the total value of plaintiff's capital stock in-
162 cludes, among other items, amounts arising from the following mileage operated, owned, leased or controlled by plaintiff which were not included or considered by said Board in its said calculations, to-wit:

Nashville, Chattanooga & St. Louis Railway,
Central Transfer Railway & Storage Company,
Georgia Railroad and dependencies,
Chicago, Indianapolis & Louisville Railway,
Louisville, Henderson & St. Louis Railway,
Lexington & Eastern Railway,
New Orleans, Mobile & Chicago Railroad,

but the defendants say that these roads were considered by the Board and the Board found from the evidence that they were not leased, owned, operated or controlled by the plaintiffs, and that the judgment of the Board in fixing the franchise assessment of plaintiff for the year 1913 shows what deductions were made from the aforesaid $18,052,905 because of the income from stock held in these roads by plaintiff. The defendants deny that the said amount of net earnings or corporate income, $18,052,905, used by the Board of Valuation and Assessment in arriving at or estimating the total value of plaintiff's capital stock includes net income arising from business originating or terminating on said lines owned, operated, leased or controlled by plaintiff whose mileage was not included or considered by said Board, which business so originating or terminating on said lines not included passed over the lines operated by plaintiff, or resulted in no income or earnings on or from plaintiff's operated mileage. The defendants deny that in like manner, or at
163 all, said net earnings or corporate income of $18,052,905, included net earnings or income accruing on the lines operated by plaintiff but arising from business originating or terminating on lines operated for account of owners the mileage of which lines operated for account of owners was not included or considered by the

Board, or that the illustration given in plaintiff's bill as to the South & North Alabama Railroad is an illustration showing that the Board was in error in arriving at the correct proportion of the value of plaintiff's entire capital stock that should be apportioned to Kentucky and they again deny that the percentage which represents the proportion which the length of plaintiff's lines operated, owned, leased or controlled in Kentucky bears to the total length of the lines operated, owned, leased or controlled by plaintiff in Kentucky and elsewhere is 24.6901 per cent. The defendants deny that before apportioning any part of the total value of plaintiff's capital stock or of the entire value of plaintiff's properties, tangible and intangible, to the State of Kentucky, the Board of Valuation and Assessment should have deducted from said total value of all properties, tangible and intangible, the value of tangible properties both within and without the State of Kentucky, or that the intangible or franchise values only should have been apportioned to Kentucky in the proportion which the length of the lines operated, owned, leased or controlled by plaintiff in the State of Kentucky bears to the total length of lines operated, owned, leased or controlled by plaintiff in Kentucky
164 and elsewhere. The defendants deny that the amount of plaintiff's tangible properties within and without the State of Kentucky which should be so deducted is at least $178,927,902.15. Defendants deny that plaintiff is entitled to deduct from the total value of its entire properties, tangible and intangible, within and without the State of Kentucky before apportionment, the real value of properties included in said total values which are separately taxed in the State of Kentucky, and they deny that plaintiff is entitled to deduct the real value of said separately taxed properties from the values apportioned to Kentucky alone, or that it is certainly entitled to so deduct the value of separately taxed properties from the values apportioned to Kentucky alone if apportionment is made to Kentucky before the value of plaintiff's tangible properties, within and without the State of Kentucky is deducted from the total value of plaintiff's properties, both tangible and intangible, wherever situated. The defendants deny that by reason of the failure of the Board of Valuation and Assessment to deduct from the total value of plaintiff's entire properties, tangible and intangible, wherever situated, the value of plaintiff's tangible properties within and without the State of Kentucky before apportioning any part of the total values to the State of Kentucky, the said Board largely increased without power or lawful authority so to do, the share or value apportionable to Kentucky, or included in the assessment of the supposed franchise or intangible property of plaintiff, large values of tangible property located and situated outside of the State of Kentucky and not
165 taxable therein, and they deny that should the said assessment be allowed to become final, it would be taxed in the State of Kentucky on the value of a large material part of its tangible property situated in other States and taxed there, or that it would thereby be deprived of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

The defendants deny that the addition of $2,318,224 made by the Board to the already alleged excessive amount of $92,181,776 apportioned by the Board to the State of Kentucky was arbitrary or capricious or without warrant of law, or that the said Board of Valuation and Assessment is without authority to make any addition to any amount apportioned on a mileage or other basis to the State of Kentucky out of the total value of plaintiff's capital stock, or out of the total value of plaintiff's property, tangible and intangible, wherever situated, but the defendants state that under the law they have the authority and the power to ascertain whether the value of plaintiff's property, mile for mile, is of more value in Kentucky than outside of Kentucky, and if the Board finds from the evidence, which it did in this instance, that there is excess value in Kentucky over and above what would be apportioned to Kentucky on a mileage basis, that it is the duty of the Board to ascertain such excess value and add it to the amount ascertained on the mileage basis, which the Board honestly tried to do. The defendants deny
166 that the addition of the said $2,318,224 was an arbitrary or capricious addition, or was not based upon any calculation or investigation or method, or that same was made merely for the purpose of bringing the already alleged exorbitant apportionment to the State of Kentucky of $92,181,776 up to the alleged arbitrary, capricious, exorbitant or unlawful apportionment of $94,500,000, and the defendants deny that the apportionment of $92,181,776 was exorbitant, arbitrary, capricious or unlawful, and they deny that there were or are no facts of record before said Board of Valuation and Assessment, or that there are no facts at all justifying or supporting or tending to justify or support an apportionment out of the total value of plaintiff's capital stock to the State of Kentucky in any such amount as $94,500,000, or in any amount approximating that amount.

The defendants say that it is true that the Board of Valuation and Assessment claims to have equalized for assessment purposes the fair cash value of Kentucky's proportion of plaintiff's entire capital stock as found by the Board, at about 80 per cent, and the defendants further admit that they did this without any authority of law in order to be certain that no injustice was done to plaintiff; but they deny that the assessing and taxing authorities in Kentucky habitually, generally, systematically, intentionally or designedly assessed for taxation property of individuals or of corporations at less than 60 per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale, and they deny that the assessment of plain-
tiff's franchise at more than 60 per cent of its fair cash value
167 will result in denying to plaintiff the equal protection of the laws of the State of Kentucky, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XXIV.

For answer to paragraph twenty-four of plaintiff's bill the defendants deny that the said defendants constituting said Board of Valua-

tion and Assessment are falsely or fraudulently pretending to have made said assessment of $45,658,630, after having considered the cost of the construction of road and equipment and the cost of reproduction thereof; the real value of plaintiff's stock and bonds and the gross and net earnings thereof within and without the State of Kentucky, and all other matters appertaining thereto that would assist the Board at arriving at a fair cash value thereof, and upon consideration of all the foregoing, and after hearing the argument of counsel for plaintiff, and after having taken time to thoroughly consider all the matters brought out in the hearing, the defendants deny that said assessment of $45,658,630, is excessive, unreasonable, unjust, illegal or arbitrary; but the defendants say that the said assessment was fair and was made after *the* thorough consideration of all the matters and things which plaintiff alleges that the said Board falsely and fraudulently pretended to have considered. The defendants deny that it is impossible for said defendants constituting the Board of Valuation and Assessment of Kentucky to have reasonably arrived at the final assessment of the value of plaintiff's
168 franchise at $45,658,630, made by them from a consideration of things and matters which they claim to have considered; and they deny that the said assessment is the result merely or at all of capricious, unauthorized, arbitrary or unlawful action on the part of said defendants, or is the result, without warrant or color of law of a fraudulent attempt on the part of said defendants to deprive plaintiff of its property without due process of law, or to deny to it the equal protection of the laws; and they say that they had full warrant of the laws of Kentucky for making the assessment which they did make, and that the same, having been *paid* in strict conformity to the laws of Kentucky, after a careful consideration of all the matters and things which the law directs and authorizes them to consider, and that for this reason, the assessment is valid and correct and was made by law through the defendants constituting the State Board of Valuation and Assessment, acting as the instruments of the law.

The defendants deny that if the defendants constituting the said Board of Valuation and Assessment did consider the gross and net earnings of the plaintiff in the State of Kentucky in ascertaining or estimating and fixing the value of plaintiff's franchise for taxation in the State of Kentucky, they acted without authority or contrary to law in that regard, or that said assessment was unauthorized or unlawful or should be declared void on that account, the defendants deny that if the said defendants constituting said Board of Valuation and Assessment considered the gross or net earnings of plain-
169 tiff within the State of Kentucky, or that if the amount of the assessment of plaintiff's franchise was in any way affected by such consideration, that the said defendants acted without warrant or authority of law, or attempted to tax or place a burden upon the gross and net earnings of plaintiff within the State of Kentucky, which said earnings are principally earnings in interstate traffic or that the effect or substance of defendants' action in this regard is to tax the right to carry on interstate commerce in the State of Ken-

tucky or to burden or regulate commerce with foreign nations and among the several States.

The defendants deny that the said defendants constituting the State Board of Valuation and Assessment of Kentucky, at the time of the making of their assessment complained of in plaintiff's bill, did not have any knowledge or information sufficient to enable them to determine what were either the gross or net earnings of plaintiff within the State of Kentucky. The defendants deny that it was shown without contradiction to said board of Valuation and Assessment or is true that the amounts of gross earnings and the amounts of net earnings shown in plaintiff's report to the Kentucky Railroad Commission are the results of arbitrary apportionments both of the earnings and expenses, or that the amount of gross earnings in Kentucky, the amount of expenses in Kentucky, or the amount of net earnings in Kentucky of plaintiff shown in said report of plaintiff to the Kentucky Railroad Commission are not reliable for the purposes for which the Board claims to have used such amounts; or that said report to the Railroad Commission of Kentucky,
170 with respect both to gross earnings of plaintiff in Kentucky or net earnings of plaintiff in Kentucky is of no value for assessment or valuation purposes, or that it is of no value in arriving at the amounts of plaintiff's gross or net earnings in the State of Kentucky, or the relative amounts of such earnings as compared with the amounts of the gross or net earnings of plaintiff over its entire system. The defendants say that they did not have knowledge or information sufficient to form a belief as to whether neither of said reports of the gross earnings, net earnings or expenses was intended to be used for assessment purposes by said Board, or that said reports were made for the purposes of comparison for the use of plaintiff between the results of its operations for the fiscal year ended June 30, 1912, and the results of the operations of previous years; but they deny that same are not accurate statements of the gross and net earnings of plaintiff, or that they were not so intended to be.

XXV.

For answer to the twenty-fifth paragraph of plaintiff's bill, the defendants say that the whole of said paragraph is irrelevant and not pertinent to any issue raised in this action; and that same should be stricken from plaintiff's bill. However, the defendants deny that during the 1912 session of the General Assembly of the Commonwealth of Kentucky, it was insistently or publicly announced by the State authorities of the State of Kentucky that said State was in debt about one and one-half million dollars, or that provision of
171 some kind must be made to increase the revenues of the State in order to take care of said debt or deficit, or to pay during the present State Administration, the amounts provided by the Confederate Pension Act and divers and sundry appropriations passed at said session of the General Assembly of the Commonwealth of Kentucky.

The defendants say that as to the principles of the Democratic party enunciated prior to the election of 1911, as enumerated in its platform, the platform itself will best show.

The defendants say that a bill providing for a Public Utilities Commission was introduced at the 1912 session of the General Assembly of the Commonwealth of Kentucky, but they say they have no knowledge or information sufficient to form a belief as to whether or not it was urged in support of the bill that the State was heavily in debt but they say that if such representations and statements were made, they were false and untrue, because the State was not then and is not now heavily in debt. They deny that it was urged that by the creation of the Public Utilities Commission, the taxation of the Public Service Corporations of the State could be materially increased, and the revenues of the State increased accordingly. However, the defendants admit that a Public Utilities Commission that would assess Public Service Corporations in an amount that would require them to bear a just proportion of the burdens of taxation in the State would enormously increase the assessment of such corporations over what it had been previous to that time. The defendants deny the
172 passage of such bill providing for a Public Utilities Commission would have affected or abridged or destroyed the influence, power or authority of said defendants, Henry M. Bosworth, Thos. S. Rhea, and C. F. Crecelius, constituting said Board of Valuation and Assessment, and they say that it may be proved that Henry M. Bosworth opposed the passage of the bill, but deny that he represented to the members of the Legislature, that the State's necessities could or would be taken care of by the Board of Valuation and Assessment without the necessity of creating the Public Utilities Commission; but they say that if he had made such representations, that the same were and are true.

They admit that the Public Utilities Commission Bill was defeated, and that thereafter the assessed values of the franchise of Public Service Corporations in the State of Kentucky were by said defendants constituting said Board of Valuation and Assessment raised; but they deny that the said assessments were unreasonably, exorbitantly or fraudulently raised, or that the defeat of said Public Utilities Bill had anything to do with such raises, either directly or indirectly.

The defendants say that they are in nowise bound by any reported interview with Governor McCreary, which interview it is claimed was given out on March 7, 1912, if such interview was ever given out, and they deny that the purposes for which the increases in the assessed values of the franchise of the Public Service Corporations were made are indicated in the alleged interview; and they deny
173 that said alleged interview shows that any assessment of such Public Service Corporations was unreasonable, exorbitant, fraudulent, arbitrary, unlawful or excessive, or that it is shown in said interview that there was any desire on the part of the Governor of the State of Kentucky that such corporations should be treated other than in a fair and impartial manner.

The defendants say that they are in nowise responsible for the newspaper article appearing in the Courier-Journal on April 12,

1912, that same was not given out or furnished by the defendants or any of them; and that said article only expresses the views of some newspaper man as to the result of the increases made by the Board of Valuation and Assessment in the assessment of the franchise of the Public Service Corporations.

The defendants say that they have no knowledge or information sufficient to form a belief as to whether the article referred to of date April 12, 1912, was given to the press in the manner set out in plaintiff's bill; and they say that they have no knowledge or information sufficient to form a belief as to whether Mr. Thos. Cromwell, the Lexington correspondent of the Cincinnati Enquirer was called to Frankfort by Mr. Justus Goebel, and upon information given by said Goebel, he prepared the article which was given to the press with the tentative figures on April 11, 1912; but the defendants deny that the said Goebel was the advisor of the Board of Valuation and Assessment or that he had any connection with the Board of Valuation and Assessment, or that he spoke for said Board or had any authority so to speak, and that if he gave out such an interview or fur-
174 nished such a statement as that referred to, he did it of his own volition, without the direction or the concurrence of the defendants constituting the State Board of Valuation and Assessment.

The defendants constituting the State Board of Valuation and Assessment say that it is true that they have not felt called upon to make a newspaper denial of an article which did not emanate from them, and that it was no part of their business to issue statements or give out newspaper interviews relative to the various comments made by the press throughout the State upon their actions in assessing the franchise of the Public Service Corporations of this State. But they deny that they have acquiesced in the correctness or truthfulness or in the correctness or truthfulness of similar statements published in other newspapers concerning the object and purposes of their said assessments from the date of their publication, up to the present time. The defendants deny that the assessment of plaintiff's franchise for taxation for the year 1912, was falsely or fraudulently made by the defendants constituting the Board of Valuation and Assessment at the amount of $45,428,074; or that it was falsely or fraudulently made at all; or that it was made for the purposes of securing or maintaining political rights, powers, privileges and profits for their personal benefit and advantage; or in fraud or denial of plaintiff's rights under the law; and that they admit said assessment is now in litigation, but they deny that same is unlawful.

175 The defendants deny that the assessment of plaintiff's franchise for taxation for 1913 as shown by said final notice of December 29, 1913, at the amount of $45,658,630, is likewise a false or fraudulent assessment made by defendants constituting the said Board of Valuation and Assessment for the purpose of securing or maintaining political rights, powers, privileges or profits for their personal benefit or advantage, or in fraud or denial of plaintiff's rights under the law. The defendants deny that the said assessment is fraudulent or unlawful, or if made under the form of law is beyond the authority or power of said defendants as constitut-

ing said Board of Valuation and Assessment, or the same is a result of an unreasonable or fraudulent abuse or of any abuse of the power vested in said Board by law, or that if said assessment is enforced against plaintiff, it will result in the taking of plaintiff's property without due process of law, and in denial of the equal protection of the laws, in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Further answering, the defendants say that the assessment complained of in this action by plaintiff in its bill was arrived at by the Board of Valuation and Assessment after a careful consideration of all the evidence, matters and things which in any way tended to show the value of plaintiff's franchise in Kentucky for the current year, and that the result obtained and the amount at which the assessment was fixed is the honest judgment of the Board, exercised in a reasonable way, and within the limitations prescribed by the laws of Kentucky.

176 Further, the defendants say that plaintiff's bill should be dismissed, and they so move, because same does not state any facts sufficient to entitle the plaintiff to relief sought or any relief; and further, because this Honorable Court does not have jurisdiction to try the issues raised as the plaintiff is a citizen of Kentucky, and it is not charged in the petition that the defendants acted under a statute or statutes of Kentucky, which are in contravention with the Constitution of Kentucky, or the Constitution of the United States.

Wherefore, having fully answered, the defendants pray that plaintiff's bill be dismissed, that they have judgment for their costs, and that they be granted all necessary and proper relief.

JAMES GARNETT,
Attorney General.
M. M. LOGAN,
Assistant Attorney General.

JNO. L. RICH,
Of Counsel.

177 STATE OF KENTUCKY,
County of Franklin, ss:

Henry M. Bosworth says that he is the Chairman of the Board of Valuation and Assessment of the State of Kentucky, and one of the defendants herein, and that the statements contained in the foregoing Answer are true.

H. M. BOSWORTH.

Subscribed and sworn to before me by Henry M. Bosworth, this 30th day of March, 1914.

J. W. MENZIES, *Clerk.*
By CHAS. N. WIARD, *D. C.*

178 And on a day following, towit, April 16, 1914, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

Came defendants and filed the protest of plaintiff filed before Board of Valuation and Assessment and this cause is set for hearing on June 8th next at 2 P. M.

179 And on a day following, towit, May 15, 1914, a stipulation was filed herein, in the clerk's office and afterwards on June 8, 1914 by order of court,—same being in words and figures as follows viz:

In the District Court of the United States for the Eastern District of Kentucky, at Frankfort, Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
versus
H. M. BOSWORTH et al., Defendants.

Stipulation.

Plaintiff having stated that it intended to take depositions under Equity Rule No. 54 unless an agreement could be had to treat as evidence the affidavits previously taken in this case and all parties being desirous of placing facts before the court as speedily and conveniently as possible without objection to the form in which the evidence is taken or presented;

Now, therefore, it is agreed between the parties by their respective counsel as follows, to-wit:

(1) The affidavits, exhibits and other evidence already made, read, filed or used in the court in this case or before the Board of Valuation and Assessment at the hearings before said Board
180 of Valuation and Assessment, referred to in the bill of complaint in this case, shall be received, accepted, considered, and treated as valid evidence upon the final hearing in this case without any objection as to the form or manner in which said evidence is presented, and shall be subject only to such objections as to competency or relevancy as such evidence would be subjected to if taken orally or by deposition in accordance with law, and no objections as to competency or relevancy of such evidence shall be taken except as is hereinafter specifically provided for.

(2) The copies of pleadings and record before the Board of Valuation and Assessment, referred to, set forth in or filed with the bill of complaint in this case, shall be deemed to be true and correct copies of the pleadings and records which they purport to represent.

(3) The copies of reports, orders and correspondence of the said Board of Valuation and Assessment, or on its behalf, and the copies of the reports, orders and correspondence of other public bodies re-

ferred to and made a part of said bill of complaint shall be deemed to be and accepted as true and correct copies of the reports, orders, and correspondence which they purport to represent.

(4) The right is reserved to all parties of introducing further evidence orally or by deposition as provided by law.

(5) For the purpose of better identification, the following affidavits, exhibits and other evidence are specifically referred to as included within the foregoing description:

181 (*a*) It is agreed that the reports of proceedings of the State Board of Equalization of Kentucky for the sessions of 1910, 1911, 1912 and 1913, omitting the tables, were as set forth in Paragraph VIII of the bill of complaint, and as shown on pages 22 to 29, inclusive, of the printed copy of said bill of complaint, which is attached hereto and made a part hereof.

(*b*) It is agreed that the equalized value of property equalized by the said State Board of Equalization for 1913, referred to in said report of May 31, 1913, was $852,181,205, and that the equalized value of property equalized by said Board for 1912, was $840,479,194, as set forth in Paragraph VIII of the bill of complaint and on pages 29 and 30 of said printed copy.

(*c*) It is agreed that the extract and copy from the report of the State Tax Commission, filed with the governor February 12, 1913, as set forth in Paragraph VIII of the bill of complaint, and on pages 30 and 31 of said printed copy, is a true and correct extract and copy.

(*d*) It is agreed that the notice of assessment of the value of plaintiff's franchise in the State of Kentucky made by the said Board of Valuation and Assessment under date of October 23, 1913, is correctly set forth in Paragraph XII of the bill of complaint, and on pages 48 to 52, inclusive, of said printed copy.

(*e*) It is agreed that the protest and petition made by plaintiff for a change and reduction of the assessment and valuation of its franchise for taxation in the State of Kentucky, as shown by said notice, was filed with the Board on November 14, 1913, and

182 was in words and figures as set forth in Paragraph XII of the bill of complaint and on pages 53 to 69, inclusive, of said printed copy.

(*f*) It is agreed that, after hearing the evidence introduced by plaintiff, the said Board of Valuation and Assessment changed the valuation of plaintiff's franchise for taxation for the taxes of 1913, and under date of December 29, 1913, defendant H. M. Bosworth issued final written notice of the assessment of plaintiff's franchise for the taxes of 1913, in words and figures as set forth in Paragraph XIV of the bill of complaint and on pages 71 and 72 of said printed copy.

(*g*) It is agreed that the two volumes and exhibits, all marked "Exhibit A," filed with the bill of complaint and referred to in Paragraph XV of the bill, is a true, correct and complete record of testimony and proceedings before the Board of Valuation and Assessment at the hearings accorded plaintiff, as set forth in said Paragraph XV of the bill of complaint, and the following affidavits are

specially referred to as filed on behalf of plaintiff and by the Attorney General, and to be considered in addition to the volumes of the transcript and other exhibits marked Exhibit A:

Filed by Plaintiff.

Bell County:

H. C. Rice, Ben R. Smith, H. E. Jones, C. N. Miller, C. E. Herd, H. C. Chappell, H. H. Steele, J. W. Campbell, A. C. Snyder, Dr. L. L. Robertson.

Carroll County:

James L. Boswell, Geo. P. Harris.

183 Christian County:

J. F. Ellis, W. P. Winfree, Thos. S. Knight.

Clark County:

J. A. Boone.

Greene County:

W. E. Clark, Pilson Smith, A. B. Cox, P. F. Marshall.

Hart County:

B. P. Moss.

Henderson County:

J. L. Ferrill, A. H. Abbott, Ben T. Kinsey.

Henry County:

S. J. Douthitt, J. V. Pearce, S. Bruce, William List, M. J. Jones, S. T. Douthitt.

Hopkins County:

C. S. Williams.

Laurel County:

H. M. Whitaker, J. W. Moren, George G. Brock, J. N. Landrum.

Lee County:

Henry Brandenburgh, G. W. Cann, C. B. Lovelace, Chas. Eveleth, Thomas Pryse, G. T. Perkins.

Marion County:

Clem Johnson, Sam J. Spalding, Herndon Goodin, Charles L. Hunter, Charles C. Boldrick, A. Kelly.

184 Ohio County:

A. C. Yeiser, S. J. Weller, R. T. Collins.

Pendleton County:

G. H. Fossitt, C. W. Carnes.

Perry County:

E. D. Campbell, Robert B. Combs, Lewis Feltner.

Powell County:
Luther Stephens, W. G. Frazier.

Shelby County:
C. S. Weakley, W. H. Tipton, Ed. D. Shinnick, J. L. Smith.

Simpson County (in statement form):
J. R. Gossett, R. A. Evans, E. S. Bradshaw, N. S. Harris, H. C. Covington.

Taylor County:
J. E. McFarland, C. W. Wright, G. W. Hord, W. G. Gilpin, Edw. Hill, J. H. Miller, Frank Bowles.

Todd County:
Lucian Lindsay, S. H. Perkins, W. S. Shelton, D. M. Butler, H. C. Miller, B. B. Butler, J. F. Kirkman.

Union County:
T. B. Young, A. W. Clements, L. C. Flourney.

Warren County:
N. R. Strange, W. C Hall, W. H. Myers, J. W. Hendricks.

185 Webster County:
L. B. Vaughn, Cosby Campbell, W. D. Edens, D. W. Wiley.

Whitley County:
W. L. Moore, J. A. Stanfill, James Murphy, L. M. Lay, J. L. Manning, Robert Monhollen.

Breathitt County:
C. J. Sewell, T. H. Hudson, Daniel Turner.

Estill County:
John D. Winn, R. M. Garrett, Jesse Lunsford.

Fleming County:
Chas. M. Lee, S. J. Collins.

Franklin County:
L. F. Johnson.

Grant County:
G. S. Webb, Robert Childers, James M. Guage, C. H. Beasley, J. T. Beagle, James P. Webb.

Larue County:
M. L. Meers.

Logan County:
G. B. Hutchings, Summers Dean, W. A. Dockins, Ed Johnson.

McLean County:
W. N. Short, D. E. Bell, John R. Priest, C. E. Beeler.

186 Muhlenberg County:
D. M. Roll, J. C. Stocke, H. C. Lewis.

Oldham County:

H. C. Hudson, W. D. Pinkston, D. H. French.

Rockcastle County:

T. J. Nicely, G. S. Griffin.

Nelson County:

W. J. Roby.

Boyle County:

R. D. Bruce.

Daviess County:

D. O. O'Dougherty.

Nicholas County:

Wm. Conley, W. E. Darragh, Jas. Mitchell, John F. Sugg, E. J. Secrest.

Jefferson County:

P. S. Ray (certificate), John Buechel, C. O. Bradford.

Filed by the Attorney General.

Nelson County:

F. Booner Rapier, W. J. Roby, R. L. Hagan, Hubert Hinkle.

Taylor County:

J. W. Cloyd, Henry R. Turner, T. W. Buchanan, W. I. Meader, G. D. Smith, J. R. Saunders (all on one sheet).

187 Green County:

Elliott Graham, J. McV. Shreve, W. F. Milby, L. E. McGinnis, Ellis Workman.

Adair County:

A. D. Patterson, N. R. Moss.

Boone County:

W. R. Rogers, B. B. Hume.

Boyle County:

D. F. Logan, J. B. Nichols, N. K. Tunis.

Fayette County:

D. W. Scott, Thomas C. Bradley.

Kenton County:

John B. Dillon.

Jefferson County:

Muir Weissinger, Harry W. Russell, A. M. Emler, Edward A. Barry, Walter S. Miller.

Lincoln County:

G. B. Cadper, Jas. P. Bailey, W. L. McCarty, John C. Peppler.

(*h*) It is agreed that the details of calculation, according to which the amount of $2,569,586.31, shown in Paragraph XXI of the bill of complaint was arrived at, were shown in a statement marked Exhibit Geo. W. Lamb, No. 6, which was filed before said Board of Valuation and Assessment, and that a copy of said Exhibit
188 Geo. W. Lamb, No. 6, is correctly set forth in said Paragraph XXI of the bill of complaint and on pages 83 to 85 of said printed copy.

(*i*) It is agreed that the method or plan pursued by the Board of Valuation and Assessment for fixing the value of plaintiff's franchise for taxation at $45,658,630.00, as shown in said final notice of December 29, 1913, is correctly set forth in Paragraph XXIII of the bill of complaint, and on pages 86 to 93 of said printed copy, except that defendants deny that the amount of $2,318,224.00, referred to on page 89 of said printed copy, was added arbitrarily.

(*j*) It is agreed that the total value of $262,252,566, was arrived at by the Board of Valuation and Assessment by the calculations shown in Paragraph XXIII of the bill of complaint, and on pages 93 and 94 of said printed copy.

(*k*) It is agreed that the resume of mileage operated by plaintiff as of June 30, 1912, divided as between mileage within the State of Kentucky and mileage outside of the State of Kentucky, showing the deduction of mileage operated for account of owners necessary to arrive at the percentage of 35.15 per cent, used by the Board of Valuation and Assessment, which resume of mileage appears in Paragraph XXIII of the bill of complaint, and on page 100 of said printed copy, correctly sets forth the mileage used and considered by the Board in arriving at said percentage of 35.15 per cent used by it.

(*l*) It is agreed that the affidavit of Geo. W. Lamb made to-wit on the 28th day of January, 1914, and filed in support of the
189 motion for a temporary injunction in this case, shall be received, accepted, and considered as valid evidence upon the final trial of the case, but defendants reserve the right to cross-examine Mr. Lamb orally at the hearing.

(*m*) It is agreed that the affidavit of H. M. Bosworth made to-wit on the 5th day of February, 1914, and filed in opposition to the motion for a temporary injunction in this case, shall be received, accepted and considered as valid evidence upon the final trial of the case, but plaintiff reserves the right to cross-examine Mr. Bosworth orally at the final hearing as a condition of the use of his said affidavit as evidence. Defendants insist that they have the right to use this affidavit of Mr. Bosworth without offering him for cross-examination. Plaintiff insists that there being no waiver of cross-examination on its part, the affidavit of Mr. Bosworth can not be used on the final hearing unless the opportunity for cross-examination is afforded.

(6) It is agreed that a printed copy of the report of the Special Tax Commission of the State of Kentucky, 1912-1914, made by W. O. Davis, Chairman, Elwood Hamilton, Secretary, W. B. Moody, W. A. Frost, L. C. Owings, and Carl C. Plehn, Expert and Adviser, to the General Assembly of the Commonwealth of Kentucky, shall be

received, accepted, and considered as valid evidence, and as a true and correct copy of the report of said Special Tax Commission without certification.

(7) It is agreed that the report of the State Board of Equalization of the State of Kentucky for 1904, shall be filed by defendants
190 and accepted as valid evidence, subject only to objections as to incompetency or irrelevancy.

(8) It is agreed that Bulletin No. 21 of the Department of Commerce and Labor, Bureau of the Census, issued from the government printing office in Washington in 1905, with respect to commercial valuation of railway operating property in the United States in 1904, shall be filed by defendants and received and accepted as valid evidence, subject only to objections as to incompetency or irrelevancy.

(9) It is agreed that the report of the State Tax Commission appointed December 21, 1908, which report was filed December 18, 1909, shall be filed by the defendants and received and accepted as valid evidence, subject only to objections as to incompetency or irrelevancy.

(10) It is agreed that the petition and protest filed before the Board of Valuation and Assessment by the Louisville & Nashville Railroad Company with respect to the first tentative assessment of plaintiff's franchise for the year 1913 by said Board, which assessment was afterward quashed, shall be filed by the defendants and shall be received and accepted as valid evidence, subject only to objections as to incompetency or irrelevancy.

(11) It is agreed that the following affidavits of former Assessors of various counties in the State of Kentucky, which affidavits were filed by defendants in suits 731 and 769 of the Illinois Central Railroad Company in this court, shall be received and accepted as valid evidence without objection as to form, but subject only to objection as to competency or relevancy.

191 Rufus Williams, ex-assessor Webster County.
W. J. Landrum, ex-assessor Breathitt County.
J. C. Pepples, ex-assessor Lincoln County.
H. F. Rodgers, ex-assessor Calloway County.
Noah B. Wooton, ex-assessor Leslie County.
J. A. Burres, ex-assessor Grayson County.
W. D. Curry, ex-assessor Green County.
C. C. McDonald, ex-assessor Knox County.
Boone Gosney, ex-assessor Campbell County.
T. G. Willis, ex-assessor Boone County.
W. T. Druen, ex-assessor Larue County.
Jno. A. Rice,
Henry Thompson,
W. E. Turner,
J. F. Rice,
} ex-deputy assessors Bell County.
R. H. Miller, ex-assessor Bullitt County.
T. W. Payne, ex-assessor Carlisle County.
J. M. Padgett, ex-assessor Scott County.
W. H. C. Seale, ex-assessor Lee County.

White Kemplin, ex-assessor Morgan County.
L. M. Van Bibber, ex-assessor Greenup County.
L. J. Harris, ex-assessor Christian County.
Geo. E. Allen, ex-assessor McCracken County.
Ben Jones, ex-assessor Bath County.
Kellie Beshears, ex-assessor Caldwell County.
T. C. Bradley, ex-assessor Fayette County.
James Proctor, ex-assessor Rockcastle County.
C. R. Marshall, ex-assessor Pendleton County.
W. R. Calbert, ex-assessor Trimble County.
J. M. Wolford, ex-assessor Adair County.
John Ingles, ex-assessor Harrison County.
G. O. Johnson, ex-assessor Ballard County.
Geo. W. Nicholas, ex-assessor Hickman County.
M. E. Lee, ex-assessor Hardin County.
Henry R. Childs, ex-assessor Mason County.
J. P. Mayfield, ex-assessor Pulaski County.
G. W. Brown, ex-assessor Hancock County.
J. M. Sparks, ex-assessor Robertson County.
Alex. Hamilton, ex-assessor Estill County.
192 Sheridan Gibbs, ex-assessor Johnson County.
B. W. Haynes, ex-assessor Meade County.
W. G. McClintock, ex-assessor Bourbon County.
Hubert Hinkle, ex-assessor Nelson County.
Elijah Hart, ex-assessor Fleming County.
M. Abele, ex-assessor Kenton County.
T. H. White, ex-assessor McLean County.
Levi Oliver, ex-assessor Lyon County.
Wiley S. Boyd, ex-assessor Graves County.
A. J. Silcox, ex-assessor Whitley County.
S. H. Byars, ex-assessor Todd County.
S. I. Taylor, ex-assessor Madison County.
C. W. Ramsey, ex-assessor Taylor County.
W. H. Bruner, ex-assessor Laurel County.
W. P. Johnson, ex-assessor Shelby County.
Edward A. Barry, ex-assessor Jefferson County.
Eugene Stark, ex-assessor Simpson County.
W. S. Blankenship, ex-assessor Boyd County.
J. R. Watkins, ex-assessor Marshall County.
F. R. Grisson, ex-assessor Monroe County.
L. D. B. Abele, ex-assessor Union County.
W. S. Carrier, ex-assessor Garrard County.
Robert H. Thomas, ex-assessor Crittenden County.
Elize Voorhies, ex-assessor Mercer County.
George Royalty, ex-assessor Breckinridge County.
Woodson Mills, ex-assessor Clay County.
L. G. Brown, ex-assessor Rowan County.
C. C. Mitchell, ex-assessor Floyd County.
S. F. Raymer, ex-assessor Edmonson County.
R. L. Mitchell, ex-assessor Anderson County.
Geo. M. Adams, ex-assessor Letcher County.

J. W. Mills, ex-assessor Casey County.
W. P. Johnson, ex-assessor McCreary County.
H. L. Jones, ex-assessor Metcalfe County.
C. A. Blanford, ex-assessor Marion County.
Columbus Cooper, ex-assessor Lewis County.
G. A. Crabtree, ex-assessor Powell County.
E. Cassity, ex-assessor Jessamine County.

193 (12) It is agreed that further similar affidavits subject to the same objections only, shall be filed by the defendants at any time before June 1, 1914, upon condition that copies of said affidavits be furnished to plaintiff's attorneys; and it is likewise agreed that plaintiff may file additional affidavits relating to the ratio of assessed values to real values of property in Kentucky at any time before June 1, 1914, upon condition that copies of such affidavits be furnished to the Attorney General; and it is likewise agreed that plaintiff may use any of the affidavits filed by the plaintiff in said cases 731 and 769 with relation to the ratio of assessed to real value of property in Kentucky upon furnishing a list to the Attorney General of the affidavits so desired to be used at any time before June 1, 1914, and plaintiff may in like manner use any affidavits filed by it in its case in this court with reference to its 1912 assessment upon furnishing a like list of such affidavits to the Attorney General on or before June 1, 1914.

(13) It is agreed that if the Board of Equalization of the State of Kentucky now in session shall make a report before the final trial of this case, defendants may file a copy of said report to be received and accepted as valid evidence upon the final trial of this case, subject to exceptions for irrelevancy or incompetency.

(14) It is agreed that letter of date October 12, 1910, addressed to F. P. James and signed by Charles Hayden, Comptroller; letter of December 19, 1912, addressed to H. M. Bosworth and signed by C. O. Bradford, Real Estate Agent; letter of date December
194 20, 1912, to C. O. Bradford from H. M. Bosworth, Auditor; letter of date February 27, 1914, to Charles Veiling, signed by C. O. Bradford, Real Estate Agent; letter of February 23, 1914, addressed to H. M. Bosworth, signed by H. L. Stone, General Counsel; letter of date February 17, 1914, addressed to H. M. Bosworth and signed by C. O. Bradford, Real Estate Agent, together with statement of mileage of Louisville & Nashville Railroad Company proper in the State of Kentucky for the franchise year 1912, attached thereto, shall be considered as valid evidence in this case, subject to exceptions for incompetency and irrelevancy.

(15) Defendants except to all reports, affidavits or statements offered as showing or tending to show the ratio of assessed to true values in the State of Kentucky, as incompetent and irrelevant. Plaintiff insists that these reports, affidavits and statements are competent and relevant and proper evidence.

(16) Plaintiff excepts to the affidavits of ex-assessors filed in the Illinois Central case, and to other similar affidavits which are to be

additionally filed in this case, and which are made out upon a stereotyped form, as incompetent and irrelevant.

(Signed) M. M. LOGAN,
Assistant Att'y General.
W. A. COLSTON,
Gen'l Solicitor L. & N. R. R. Co.

195 And on a day following, towit, on June 8th, 1914, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This day came the plaintiff by Henry L. Stone, W. A. Colston and Helm Bruce, its attorneys, and also came the defendants by James Garnett, M. M. Logan, John L. Rich and R. T. Caldwell, their attorneys. On motion of the plaintiff, agreed to by the defendants, their stipulation filed in the clerks' office on May 15th last is now ordered to be and same is hereby filed of record, which stipulation, and the agreements therein contained are approved by the court and authorized accordingly, and on motion of plaintiff the certificate of assessor of Louisville, Kentucky, and copies of forty-nine affidavits lodged in clerk's office on May 29th, 1914, the report of special tax commission of Kentucky, 1912-14 and four exhibits lodged in clerk's office on June 4, 1914, are now ordered to be and the same are hereby filed of record.

It is ordered by the court that the affidavits, exhibits, papers, documents and other evidence referred to in the above mentioned stipulation shall be considered as evidence in this case and that the said evidence which has been filed in other cases in this court
196 and referred to in said stipulation shall be considered by this court the same as if such evidence had been filed in this case.

The defendants thereupon produced copies of affidavits referred to in the bill of complaint and exhibit A therewith, being the affidavits produced and filed by the Attorney General before the Board of Valuation and Assessment at its hearing of the 1913 assessment against plaintiff herein, which affidavits referred to the ratio of assessed value to the true value of property in the State of Kentucky for the years 1912 and 1913; and it is ordered that said copies of affidavits be substituted for the originals and said copies are ordered to be and same are hereby filed. Also came the defendants and produced nineteen affidavits of ex-assessors as authorized by the provisions of Section 12 of said stipulation, which affidavits are ordered to be and the same are hereby filed. Also came the defendants and produced portions of the return of the plaintiff to the auditor for the use of the Kentucky Railroad Commission for the year- 1912 and 1913, which portions of said reports are ordered to be and the same are hereby filed. Also came the defendants and produced letter from Charles Hayden to F. P. James, Auditor dated October

12, 1910; letter of C. O. Bradford to H. M. Bosworth, Auditor, dated December 19, 1912; letter to C. O. Bradford from H. M. Bosworth, dated December 20, 1912; letter to Charles J Veiling from C. O. Bradford, dated February 27th, 1914; letter from Henry L. Stone to H. M. Bosworth, dated February 23, 1914; letter to
197 H. M. Bosworth, from C. O. Bradford, dated February 17, 1914 and exhibit thereto attached, each of which letters, together with said exhibits are ordered to be and same are hereby filed.

It is further ordered by the court that the Census Bulletin No. 21 relating to the commercial valuation of railroads, and the proceedings of the State Board of Equalization of the State of Kentucky for the year 1904 and the report of the Auditor of Kentucky for the year- 1904 and 1905 which are filed in case- No. 731 and No. 769 in this court shall be considered as evidence in this case, the same as if said Bulletin and reports had been filed as a part of the record in this case.

It is also ordered by the court that the report of the tax commissioners appointed December 21, 1908, which is filed in cases No. 731 and 769 shall be considered as evidence in this case, as if filed of record in this case.

It is also ordered by the court that the Annual Report of the Louisville and Nashville Railroad to its stockholders for the years 1911 and 1912 shall be considered as evidence in this case and same are ordered to be and are hereby filed.

It is also ordered that the report of the Louisville and Nashville Railroad Company to the Interstate Commerce Commission for the year ending June 30, 1912 shall be considered as evidence in this case and the same is ordered to be and is hereby filed.

Plaintiff introduced as witnesses John E. Garner, George W. Lamb, who testified orally before the court as shown by the transcript of said testimony made by J. G. McLean and the exhibits therewith, which transcript and exhibits are hereby filed.

198 On June 8, 1914, the following supplemental stipulation was filed in open court, towit:

In the District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
versus
H. M. BOSWORTH et al., Defendants.

Supplemental Stipulation.

Pursuant to the provisions of paragraph 12 of stipulation entered into heretofore between the parties hereto, it is now agreed that the following affidavits may be filed and treated as evidence in this case

without any objection except on the grounds of incompetency or irrelevancy:

D. G. Coffey, ex-assessor Russell County.
J. A. Lee, ex-assessor Butler County.
Eugene A. Wooten, ex-assessor Barren County.
Clabe Mosley, ex-assessor Knott County.
J. W. Wilkerson, ex-assessor Hart County.
J. R. Ryan, Jr., ex-assessor Livingston County.
R. R. Hatfield, ex-assessor Pike County.
A. Jones, ex-assessor Owen County.
Charlie Rice, ex-assessor Lawrence County.
F. M. Price, ex-assessor Grant County.
199 William Ferguson, ex-assessor Gallatin County.
J. E. Robertson, ex-assessor Carroll County.
James Gray, ex-assessor Trigg County.
W. H. Myers, ex-assessor Warren County.
Harrison Lee, ex-assessor Franklin County.
N. M. Howard, ex-assessor Elliott County.
John Miller, ex-assessor Jackson County.
James Welch, ex-assessor Menifee County.
T. C. Noe, ex-assessor Harlan County.

200 And on a day following, towit, on October 26, 1914, an order was made and entered herein, same being in words and figures as follows, towit:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This day came the plaintiff by counsel and filed herein an affidavit identified as "G. W. Lamb No. 2" and exhibits A-B-&-C-&-D therewith, which are ordered to be read as evidence upon the trial hereof as in case of other affidavits herein.

Thereupon this cause is submitted, and the court not being sufficiently advised, took time to consider the same.

201 And on a day following, towit, on August 31" A. D. 1915, an order was made and entered herein, same being in words and figures as follows, towit:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

The foregoing case having been generally submitted, and the court having duly considered same and being sufficiently advised, filed its written opinion in said case and the attorneys in said case will prepare and submit to the court orders drawn in accordance with said opinion.

And on the same day, towit, August 31, 1915, the opinion referred to in the foregoing order was filed herein, same being in words and figures as follows, viz:

202 (District Court, E. D. Kentucky, August 31, 1915.)

No. 768.

LOUISVILLE & N. R. Co.
v.
BOSWORTH et al.

1. Taxation *493(1)—Assessment—Power of Courts to Review.

An assessment of property by a board charged with that duty is subject to review and revision by the courts, where it is found that the board did not follow the method prescribed by statute, or otherwise adopted some fundamentally wrong principle, although fraud is not shown.

[ED. NOTE.—For other cases, see Taxation, Cent. Dig. §876; Dec. Dig. *493(1); Appeal and Error, Cent. Dig. §141.]

2. Taxation *376(1)—Assessment of Railroad Franchise—Kentucky Statutes.

In computing the mileage of an interstate railroad company, for the purpose of the assessment of its franchise under Ky. St. §4081, which requires the apportionment of the mileage as a factor in the apportionment of the capital stock valuation, the length of all the lines, either operated, owned, leased, or controlled by the company, in the state or elsewhere, is to be taken into consideration.

[ED. NOTE.—For other cases, see Taxation, Cent. Dig. §§625, 629-631; Dec. Dig. *376(1).]

3. Constitutional Law *209—"Equal Protection of Laws"—Control Over Governmental Agencies.

The "equal protection of the laws" provision of the Fourteenth Amendment extends to each department of the state government in the exercise of its especial functions, and to all who represent the state as officers or agents, and the laws to which the provision refers are the laws of the state.

[ED. NOTE.—For other cases, see Constitutional Law, Cent. Dig. §678; Dec. Dig. *209.

For other definitions, see Words and Phrases, First and Second Series, Equal Protection of the Laws.]

203 4. Constitutional Law *229(3)—Equal Protection of Laws—Inequality of Taxation.

Where the Constitution of a state requires the equal taxation of all

*For other cases see same topic & Key-Number in all Key-Numbered Digests & Indexes.

property, the enactment by the Legislature of laws, or the action of executive officers in enforcing them, which in either case results in the intentional assessment or taxation of one class of property at a higher rate than another class is a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

[ED. NOTE.—For other cases, see Constitutional Law, Cent. Dig. §685; Dec. Dig. *229(3).]

5. Taxation *485(1)—Assessment—Application of Different Standards of Valuation.

Where the assessing department of a state uniformly applies different standards of valuation to different classes of property, the result is necessarily inequality and discrimination in taxation, which must be presumed to have been intentional, and the same is true, although the assessments are made by different boards or officers.

[ED. NOTE.—For other cases, see Taxation, Cent. Dig. §861; Dec. Dig. *485(1).]

6. Constitutional Law *229(3)—Assessment—Railroad Franchise—Equal Protection of Laws.

The assessment of the franchise of an interstate railroad company in Kentucky by the state board of valuation and assessment at a sum noted on its record to be in the opinion of the board "less than 80 per cent." of its fair cash value, whereas it was shown that other property in the state was uniformly undervalued and assessed at not more than 60 per cent. of its fair cash value, held a discrimination against the company, which denied it the equal protection of the laws, in violation of the Fourteenth Amendment and entitled it to equitable relief.

[ED. NOTE.—For other cases, see Constitutional Law, Cent. Dig. §685; Dec. Dig. *229(3).]

7. Constitutional Law *209—"Denial of Equal Protection of Laws."

By "denial of equal protection of the laws," under Const. U. S. Amend. 14, is meant to refuse to grant or to withhold equal treatment in conferring or securing rights or imposing or exacting performance of duties, intentionally to treat differently, or to discriminate in so doing.

[ED. NOTE.—For other cases, see Constitutional Law, Cent. Dig. §678; Dec. Dig. *209.

For other definitions, see Words and Phrases, First and Second Series, Equal Protection of the Laws.]

In Equity. Suit by the Louisville & Nashville Railroad Company against H. M. Bosworth, Thomas S. Rhea, and C. F. Crecilius, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky, H. M. Bosworth, Auditor of Public Ac-

*For other cases see same topic & Key-Number in all Key-Numbered Digests & Indexes.

counts of the State of Kentucky, G. B. Likens, Assistant Auditor, James Garnett, Attorney General, C. H. Morris, First Assistant Attorney General, M. M. Logan, Second Assistant Attorney General, O. S. Hogan, Third Assistant Attorney General, of the state of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky. On final hearing. Decree for complainant.

204 Henry L. Stone, Helm Bruce, Ed. S. Jouett, Wm. A. Colston and Robt. E. Fleming, all of Louisville, Ky., for plaintiff.
James Garnett, Att'y Gen., M. M. Logan, First, Ass't Att'y Gen., C. H. Morris, Second Ass't Att'y Gen., O. S. Hogan, Third Ass't Att'y Gen., and John L. Rich, of Covington, Ky., for defendants.

COCHRAN, *District Judge:*

This suit is before me for final decree. The plaintiff seeks thereby an injunction against the enforcement of the assessment of its franchise in this state for the year 1913. The amount of the assessment is $45,658,630. When it was brought another suit was pending in which plaintiff sought an injunction against the enforcement of the assessment for the year 1912, which amounted, substantially to the same sum, to wit, $45,428,074, and I had sustained a motion therein for a preliminary injunction on condition that the taxes on $22,899,200 thereof be first paid, which condition was complied with. In that connection I delivered an opinion reported in 209 Fed. 380. That suit is also before me for final decree and is disposed of by a separate opinion. Before bringing this suit plaintiff paid the taxes for the year 1913 on that sum, which left the assessment for enforcement only as to the balance of the $45,658,630. A preliminary injunction was granted on filing the bill.

The details of the assessment, showing the manner in which the board arrived at $45,658,630 as the value of the franchise, are these: The board first found the fair cash value of plaintiff's capital stock, hereafter termed its unit, to be $262,252,566. This valuation it arrived at by capitalizing at 6 per cent. what it took to be plaintiff's net income from operations on its own account for the year ending June 30, 1912, as of which date the assessment speaks, less what it took to be its net income from certain property which it took to be nontaxable. Plaintiff's reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission as of that date state plaintiff's net income for that year to have been $18,052,905.12. This included the net income from the operation by plaintiff of three railroads, two in and one out of Kentucky, on account of the owners, which amounted to $1,439,604. The board deducted this sum from the total, leaving a balance of $16,613,301.12 of net income from operations on its own account. It then deducted from this balance the sum of $878,147 on account of its net income from such nontaxable property. This left a balance of $15,735,154, which capitalized at 6 per cent. gave the sum of $262,252,566, at which it valued the unit.

The nontaxable property, the income from which was thus deducted, consisted of stocks in other corporations which owned property in this state and which had paid the taxes thereon. The deduction was based on sections 4085 and 4086, Kentucky Statutes, and the construction thereof by the Court of Appeals in the cases of Com. v. Walsh's Trustee, 133 Ky. 103, 117 S. W. 398, and Com. v. Fidelity Trust Co., 147 Ky. 77, 143 S. W. 1037. It then apportioned $92,181,766 of this sum to Kentucky. The sum so apportioned was 35.15 per cent. thereof. The percentage which it took was the percentage which the mileage operated by plaintiff in Kentucky on its
205 own account was of the entire mileage so operated by it. The entire mileage so operated by it was 4,478.61, of which 1,574.41 was in Kentucky. It then added to the sum so apportioned $2,468,612, the excess in the value which it took that the portion of the unit in Kentucky was over such mileage proportion of the value thereof. It found this excess in value to be in the intangible part of the portion of the unit in Kentucky, and that in this way: The value of the tangible part it took to be $177,038,113, and that of the intangible $85,214,453. The proportion of the gross income derived from Kentucky of the entire gross income it took to be 38 per cent., or 2.85 per cent. in excess of such mileage proportion. It took it that this showed that the value of the portion of the intangible part of the unit in Kentucky was 2.85 per cent. of the value of such part, or the sum of $2,468,612 in excess of such mileage proportion thereof. Adding this sum to such mileage proportion of the value of the unit, to wit, $92,181,766, made the value of the portion of the unit in Kentucky $94,650,388. It then reduced this sum to that of $94,500,000 as the value. This reduction is not to be accounted for, except on the ground that it wanted to place the value of such portion in round numbers. This lessened the addition to such mileage proportion of the value of the unit on account of the excess in value of the portion of the intangible part of the unit in Kentucky over such mileage proportion thereof from the sum of $2,468,612 to $2,318,244, which latter sum was the difference between $94,500,000 and $92,181,766. But the board had no sooner made this reduction than it made a further reduction from this sum in round numbers to another sum, not in round numbers, to wit $75,139,402, as the value of the portion of the unit in Kentucky, and there it stayed. On the assumption that this sum was reached by reducing from $94,500,000, there is no accounting for how it reached it, rather than any other sum. The only account of it which it gave was that it so did "to be conservative, and out of an abundance of caution, to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this state." And it noted the fact that this sum was "less than 80 per cent. of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent." It then deducted from this last sum the assessed value of the tangible property in Kentucky, to wit, $29,500,772, which left the sum of $45,658,630 as the value of the franchise. Such is what the board did on the face of things.

In making the assessment for 1912 what the board did on the face of things was this: In the preliminary assessment it valued the portion of plaintiff's unit in Kentucky at $81,670,377, the manner in which it obtained such value not appearing, and then deducted therefrom the assessed value of the tangible property, to wit, $29,170,377. This left $52,500,000, which it fixed as the value of the franchise. In the final assessment it valued such portion at $74,598,451, the manner in which it obtained such value also not appearing, and then deducted therefrom such assessed value, to wit, $29,170,377. This left $45,428,074, which it fixed as the value of franchise. In my opinion in the case involving that assessment I took note
206 (209 Fed. 460) of the fact that it was possible, if not probable, that the board in making the preliminary assessment had obtained the value of the portion of the unit in Kentucky which it fixed at $81,670,377, not by first valuing the unit and then apportioning a part of such value to Kentucky, but by determining, in the first instance, that the franchise should be $52,500,000 and then adding the assessed value of the tangible thereto, and that in making the final assessment it merely made a reduction from the valuation so obtained to $74,598,451, at which it fixed it therein. In the case in hand one cannot avoid the suspicion, at least, that what the board really did was practically to adhere to the assessment for 1912 so reached—the change being only from $45,428,074, to $45,658,630—then to add the assessed value of the tangible property for 1913 thereto, which gave $75,139,402 as the value of the portion of the unit in Kentucky, deducting from which the assessed value of the tangible property gave the value of the franchise already fixed, and then to make the other figures to show that the sum at which it placed the value of the portion of the unit in Kentucky was less than 80 per cent. of its fair cash value. What lends color to this is the difficulty of determining how otherwise $75,139,402 was arrived at as the value of such portion. This tends to show that the assessment for 1913, as well as for 1912, was predetermined, and not the outcome of pursuing the method prescribed by the statute.

[1] The particulars in which plaintiff attacks the action of the board and the grounds thereof come next for statement. But before presenting them a preliminary contention of defendants should be noted and disposed of. It is that the action of the board is final and conclusive unless fraud on its part has been shown. It is contended that such is the case, even though it appears that the board did not follow the method prescribed by the statute. That such is their contention I quote from their brief. They say:

"This board is the judge of both the law and the facts, and its judgment as to the method followed is conclusive, unless fraud be proven tending to show that the board was actuated by fraudulent motives. These proceedings are not appeals from the judgments of the board of valuation and assessment. This court is not seeking for errors committed by this board. This court does not have the power to say whether the board followed an erroneous method in

making the assessments, except as an incident to one thing, and that one thing is fraud. If there has been evidence showing fraudulent conduct on the part of the board, the court must consider other evidence touching on values and methods; but this court has no power to consider such things until after it is first shown that the assessment is void on account of fraud. If such state of facts should be shown, it would then be necessary for the court to take up the question of values, and in order to correctly ascertain values it would be necessary to consider methods."

And again they say:

"Until fraud is shown the court cannot consider any evidence as to either methods followed or as to values, but if fraud is shown the court must consider other matters in order to conclude whether the assessment is unjust."

They cite in support of this contention the following decisions of the Supreme Court of the United States, to wit: State Railroad Tax Cases, 92 U. S. 595, 610, 616, 23 L. Ed. 663; Kelly v. Pitts-
207 burg, 104 U. S. 78, 80, 26 L. Ed. 658; Pittsburg R. R. Co. v. Backus, 154 U. S. 421, 434, 435, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Maish v. Arizona, 164 U. S. 599, 610, 611, 17 Sup. Ct. 193, 41 L. Ed. 567; San Diego L. T. Co. v. National City, 174 U. S. 739, 750, 19 Sup. Ct. 804, 43 L. Ed. 1154; C., B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 593, 596, 598, 27 Sup. Ct. 326, 51 L. Ed. 636.

These decisions should be generalized. The cases of Kelly v. Pittsburg and Maish v. Arizona go together. They are alike, in that they involved assessments of ordinary property—in the one case a farm, in the other stock cattle—by local officials. That of San Diego L. T. Co. v. National City stands by itself. It involved the exercise of an analogous function, to wit, fixing water rates by a local body. The other three go together. They are alike, in that they were railroad cases and involved the assessment of a portion of a railroad unit. In the State Railroad Tax Cases the units were intrastate, and the portions thereof covered by the assessments complained of were the intangible parts there; i. e., the franchises. In the other two cases, the units were interstate, and the portions thereof so covered were the parts in the state where the assessments were made. The statutes involved therein did not view such parts as parts of interstate units. The boards, however, in making the assessments, did. In neither of the five tax cases did the statute prescribe the method of making the assessment. In the State Railroad Tax Cases it authorized the board to adopt such method as might seem equitable and just, and the method it had adopted and applied was approved by the court. In neither of the others was there clear evidence that improper methods had been adopted and applied. As neither of them involved a case where a method prescribed by statute had not been followed, there is no basis for the claim that they support the position that, if it clearly appears that the board in making the assessment departed in certain particulars from the method prescribed by the statute, its validity is thereby unaffected, unless fraud has been shown.

This much is certainly to be gathered from these decisions: The judgment of an assessing official or board as to the value of ordinary property, such as a farm or stock cattle, is final, in the absence of fraud; and this, though its valuation may be thought to be "very greatly in excess of its true value." No method of valuing such property is ever prescribed; correct thinking does not call for any particular method for so doing; and as to the true value thereof there is room for fair-minded and reasonable men to differ. Possibly it is also to be gathered therefrom that if the property valued is the unit of a railroad company, even though it be interstate, in which case the valuation thereof is merely a step in the process of valuing the portion or a part of the portion thereof in the state, its judgment as to its value is final, in the absence of fraud, if no method for valuing such unit has been prescribed. It is true that two methods of valuing it have been adopted and applied, and approved by the courts, known as the stock and bond and capitalization of net earnings. But there is room for fair-minded and reasonable men to differ as to which is the best method, and, in each case, as to the de-
208 tails thereof. Besides, perhaps, it cannot be said that the valuation should be limited absolutely to either method. It may be proper to consider other matters, such, for instance, as the cost of construction. And it may be a case for the exercise to some extent at least of what Mr. Justice Holmes in C., B. & Q. R. Co. v. Babcock terms the "intuition of experience."

But this is not all that is to be gathered therefrom. From the case of C., B. & Q. R. Co. v. Babcock it is to be gathered that the courts are not limited to fraud as the only ground for overthrowing such an assessment; that if, in making it, the board adopted a fundamentally wrong principle in any particular, the assessment is void; and that in determining whether such a principle was adopted the court is to no extent affected by the judgment of the board. As to this it is free to substitute its judgment for that of the board. And it would seem that it would make no difference that the principle was embodied in the statute under which it acted. In such a case it would be immaterial that there had been no fraud on the part of the board. Mr. Justice Holmes, in that case, speaking generally as to the validity of such an assessment, said that the judgment of the "lay tribunal" was intended to be final, "notwithstanding mistakes of fact or law." He, however, did not say that it was so intended absolutely, but only "so far as may be." He went further, and pointed out the grounds upon which it might be attacked. And in so doing he did not limit the right to attack to fraud. He said that the court had to do with nothing less than fraud, or a "clear adoption of fundamentally wrong principle"; and again, that the tribunal was the ultimate guardian of certain rights, except "in the case of fraud or a clearly shown adoption of wrong principles."

What he had in mind as covered by the second alternative appears from the cases of Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 468, 47 L. Ed. 519, and Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. In the latter case it was held that certain personal property of the American Express

Company located in New York was no part of its interstate unit, a portion of which was subject to taxation in the state of Indiana. The board of that state had taken it to be a part of the interstate unit and apportioned a part thereof thereto on the mileage basis. The Supreme Court held that in so doing it had erred. It substituted its judgment for that of the board and set the latter aside. There had been no fraud on the part of the board. The Sixth Circuit Court of Appeals had held likewise in the case of Coulter v. Weir, 127 Fed. 897, 62 C. C. A. 429. The other case was a Kentucky case. The board of valuation and assessment had taken the ferry franchise of the Louisville & Jeffersonville Ferry Company in Indiana to be a part of its interstate unit—which undoubtedly it was—and assessed it. The Supreme Court held that, notwithstanding it was a part of the company's interstate unit, it was not assessable to any extent in Kentucky. It substituted its judgment for that of the board and set the latter aside. There was no intimation of fraud on the part of the board.

If, then, it is the duty of the court to substitute its judgment for that of the assessing board, and to set the latter aside in
209 making the assessment, if it has adopted fundamentally wrong principles, clearly it not only has the right, but it is its duty, to so do if it determines that the board has not followed the method prescribed by the statute under which it acted and from which it obtained its power to act at all. And so the Court of Appeals of Kentucky has held in the cases of Hager v. American Surety Company, 121 Ky. 791, 90 S. W. 791, and James v. American Surety Company, 133 Ky. 313, 117 S. W. 411. If it then appears that, in some particular, the board in making the assessment in question here departed from the method prescribed by the statute, or adopted some fundamentally wrong principle, to the extent, at least, that such departure or adoption affects the amount thereof, it cannot stand.

The plaintiff attacks the valuation of the unit at several points. It urges that the capitalization should have been at 6.524 per cent., the average of the interest rates of the different states wherein plaintiff's unit lies, instead of 6 per cent.; that the true net income derived from operations by it on its own account was $15,862,099.26, instead of $16,613,301; that the true net income from nontaxable property was $992,494.08, instead of $878,147; and that the deduction should not have been of the net income received from such property from that received from operations on its own account, but of the actual value of such property, which it places at $33,743,900, from the sum arrived at by capitalizing the net income from such operations. I think that the board's valuation of the unit is impervious to attack in this court on either of these grounds. I am not satisfied that the nontaxable stocks are really worth the amount claimed or more than the capitalization of their income. And I am not sure that plaintiff is entitled to any deduction on this ground. I am sure that it is not my province to substitute my judgment for that of the board as to the rate of interest at which plaintiff's income should be capitalized in valuing its unit on the capitalization plan. The other two particulars

in which the valuation of the unit is attacked are for mistakes of fact; and, conceding them to have been made, it is not in my power to correct them. So that in disposing of this case the value of the unit will have to be taken to be at least as much as $262,252,566, the amount found by the board.

[2] The plaintiff next attacks the action of the board in limiting itself to the mileage operated by it, and, as to it, to that operated by it on its own account, in arriving at the portion of the value of the unit to be apportioned to Kentucky. It claims that in so doing it should have considered all the mileage operated by it, and also that owned, but not operated, by it, and that operated by separate organizations, which is controlled either by virtue of ownership of a majority of capital stock or as joint owner or lessee, heretofore referred to as controlled mileage. The miles operated by it on its own account, as we have seen, were 4,478.61, of which 1,574.41 were in Kentucky; those operated by it on account of the owners were 221.86 of which 21.42 were in Kentucky; those owned, but not operated, by it were 269.45, of which 70.11 were in Kentucky; and those controlled by it were 2,937.89, of which 286.45 were in Kentucky. Adding the miles operated by it on its own account and on the owner's account,
210 and those owned, but not operated, by it, and those controlled by it together, gives 7,907.83 as the total number, of which 1,952.45 were in Kentucky. The percentage which the latter sum is of the former is 24.9601. It is this percentage, rather than that of 35.15, which it claims the board should have taken in apportioning a part of the value of the unit to Kentucky. And it bases this position on the express requirement of the statute. The proportion of the value of the unit which it prescribes is that "which the length of the lines operated, owned, leased or controlled in this state bears to the total length of the line owned, leased or controlled in this state and elsewhere." Beyond question the word "operated" was omitted by mistake in referring to the total length of the lines, and the clause should be read as if it had been inserted there as well as in the first instance.

It seems to me that this position is sound. I so held in the case of L. & N. R. R. Co. v. Coulter (C. C.) 131 Fed. 306, and the decision of the Kentucky Court of Appeals in the case of Com. v. L. & N. R. R. Co., 149 Ky. 829, 837, 150 S. W. 37, is to the same effect. That was a proceeding by an auditor's agent to have certain property of the plaintiff herein assessed for the year 1909 as omitted property. One basis for claiming that it had been omitted was that the board of valuation and assessment had not properly assessed its franchise, in that it had taken into consideration the controlled mileage. Clay, C., in delivering the opinion of the court, said:

"But there is an attempt to show that in this case the property sought to be assessed as omitted property was not included in the capital stock valuation, because the board of valuation and assessment, in fixing the capital stock, considered other roads controlled by the Louisville & Nashville Railroad Company, through stock ownership, but which were operated by their own organizations. The statute requires that the railroad company shall report to the auditor

of public accounts its entire lines 'operated, owned, leased or controlled' in and out of the state. If the railroad company owns a majority of the stock of another company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the auditor. If required to be reported, the board of valuation and assessment may take them into consideration in fixing the value of the franchise of the controlling company in * * * Kentucky. That being true, the allegations in the second paragraph of the petition are not sufficient to show that the board of valuation and assessment, in fixing the value of appellee's franchise, adopted a plan different from that provided by the statute."

The plaintiff next attacks the action of the board in adding first $2,468,612 and finally $2,318,244 to the mileage proportion of the value of the unit on account of excess of the value of the portion of the intangible part of the unit in Kentucky over the mileage proportion thereof. The board based its action in making this addition to such mileage proportion of the value of the unit on what it conceived I had held in the other case. I there took the position that the statute did not limit the assessment to the mileage proportion of the value of the unit, but contemplated that, if the portion of the unit in Kentucky was in fact of greater value than the mileage proportion of the value of the unit, the board, after ascertaining such proportion, should add thereto the excess in value, so that the value of
211 such portion would represent the true fair cash value thereof, and, further, that the method of ascertaining whether the portion of the intangible part of the unit in Kentucky exceeded in value the mileage proportion of its value, and, if so, the extent to which it exceeded it, was to determine the proportion that the gross income derived from Kentucky was of the entire gross income, and if it exceeded the mileage proportion the excess percentage of the value of the unit was to be taken as the excess in value.

The plaintiff, in making its attack on this part of the action of the board, contends that it is impossible to determine how much of the gross income of an interstate unit has been derived from a given state otherwise than on the mileage basis, and that therefore in no case can the intangible part of the unit therein exceed in value the mileage proportion of the value thereof. It claims that this position finds support in the decision of the Court of Appeals of Kentucky in the case of Southern Ry. Co. v. Coulter, 113 Ky. 657, 675, 676, 68 S. W. 873, and, further, that every case wherein the Supreme Court of the United States has taken note of the fact that the portion of an interstate unit in one state might exceed in value the average value per mile involved a case of excess in the tangible part, where there is a manifest physical difference which can be seen and measured by some rational and reasonably accurate judgment, such as extensive and expensive terminal property existing in one state, which does not exist in the other state into which the line extends, or where an extra amount of rolling stock is required in one state and not in others, which are illustrations given in the case of Pittsburg, etc. v.

Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, and had in mind in the case of Fargo v. Hart, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. And it might be added that in the case of Erie R. R. Co. v. Pennsylvania, 21 Wall. 492, 22 L. Ed. 595, which involved a tax on the gross receipts of an interstate railroad in Pennsylvania, the extent of the gross receipts therein was obtained by apportioning them on the mileage basis.

In taking the position I did on this subject I cannot say that I was sure of my ground. The problem was a difficult one, and I had not had the benefit of any suggestions of counsel in regard thereto. It had not been dealt with in any other case, so far as I was able to find. It was not then a vital question, necessitating that I should be sure of my ground. Nor am I any surer now than then as to the soundness of the position. The necessities of this case also do not require that I should absolutely commit myself on the question. What made me then, and makes me still, think that the portion of the intangible part of an interstate unit in a given state may be greater in value than the mileage proportion of the value thereof is the case of W. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. There an apportionment of a part of the interstate unit of the telegraph company to the state of Massachusetts on the mileage basis was upheld, notwithstanding that the value of the portion of the tangible part of that unit in that state was less than the mileage proportion of the value thereof, and this seems to have been done on the ground that the value of the portion of the intangible part thereof in that state was greater than the mileage proportion of the value
212 thereof, and that because the gross income derived from that state exceeded the mileage proportion of the gross income. What relieves me of the necessity of so committing myself is that, if my position so followed by the board be conceded to be sound, but one possible method to determine with any degree of accuracy the amount of the gross income derived from Kentucky, apart from the mileage basis, occurs to me, and the board not only did not pursue that method, but adopted a method that clearly did not yield the true amount thereof. The possible method to which I have reference is first to separate the interstate and intrastate gross income, then apportion to Kentucky a part of the interstate gross income on the mileage basis, and then add thereto the intrastate gross income. As stated, the board did not follow this method. It did not have the data which would enable it to follow it. It took what plaintiff in its report to the Kentucky Railroad Commission for the year ending June 30, 1912, gives as its Kentucky gross income as the true gross income derived from Kentucky.

But it clearly appears that the amount so reported was not obtained by the method I have suggested. It represented the gross income from traffic which originates and terminates in Kentucky and traffic which originates in Cincinnati, Ohio, where plaintiff has an important terminal, and passes entirely through Kentucky to states south of her. The fact that plaintiff in this report termed this income as Kentucky gross income or earnings did not prevent it from showing its true character. Other interstate railroad com-

panies operating in Kentucky used this title in their reports and this in a different sense. The Cincinnati, New Orleans & Texas Pacific Company confines it to income from traffic which originates and terminates in Kentucky. It omits that arising from traffic which passes through the state of which there must be a large amount; and the Chesapeake & Ohio Railway Company confines it to income arising from traffic which originates in Kentucky. It is clear, therefore, that in this particular also the action of the board was not well taken. It cannot, however, be said that, in taking it, it did not follow the statute, or did that which the statute prohibited it from doing. The statute contains no provision on the subject. All that can be said is that the board in so doing adopted a fundamentally wrong principle, and this I think can be truly said.

In this connection I would restate with some difference the position which I took in the other case, to the effect that the board was limited to a consideration of the mileage proportion—i. e., the proportion which the mileage of that part of the unit which was in Kentucky was of the entire mileage thereof—of the value of the capital stock in apportioning a part of such value to Kentucky, and could not consider the proportion derived from averaging the mileage, gross income, and net income proportions of the value thereof in so doing. I emphasized the fact that what the statute provided the board should consider was not the mileage proportion, but the mileage proportion of the value of the capital stock. I would not repeat this emphasis. A consideration of the mileage proportion, in averaging it with the gross income and net income proportions, so as to obtain an average proportion to be used in apportioning a
213 part of the value of the capital stock to Kentucky, could be excluded, and the consideration limited to the mileage proportion of the capital stock, and exactly the same result obtained as if the mileage proportion were so considered. This would be by apportioning to Kentucky the mileage proportion of the value of the capital stock, the gross income proportion thereof, and the net income proportion, and then averaging the three. What excludes an apportionment to Kentucky of such average proportion of the capital stock, or the gross or the net income proportions of such value and then averaging them with the mileage proportions thereof, is the fact that the statute provides that the board shall consider the mileage proportion of the value of the capital stock, and says nothing about such average proportion, or the gross or net income proportions thereof.

That the statute (Ky. St. §4081), in providing that the board should consider the mileage proportion of the value of the capital stock, meant that it should, after valuing the capital stock, as a step in the process of valuing the franchise, apportion a part of such value to Kentucky on such basis, follows from the fact that it contemplated that the franchise should be valued as a part of an interstate unit, the first step in which was to value the unit. There was no way to pass from this first step to the last one—i. e., valuation of the franchise—except by taking a mileage proportion of the value of the unit. It was not necessarily the only intermediate step. The

intermediate steps might include an addition or subtraction on account of the portion of the unit in Kentucky exceeding or being less than the mileage proportion of the value of the unit. But it was necessarily one of the intermediate steps. Had the statute not limited the board's view of the franchise to it as part of an interstate unit, and permitted it to view it independently of its being so, a provision that the board in valuing it should consider the mileage proportion of the value of the unit would not necessarily mean that it should apportion a part of the value of the unit on such basis to Kentucky, as a step in valuing the franchise. It could mean no more than that it should be considered merely for the purpose of determining whether the valuation of the franchise, otherwise reached, was correct or not. I have had difficulty in reaching a conclusion as to just what the statute means in providing that the board shall consider the mileage proportion of the capital stock, and this is the best that I can make of it.

These, then, are all the attacks make upon the action of the board save one, yet to be mentioned and considered. Apparently the effect of the conclusions so far reached, to wit, that the board's valuation of the unit at $262,252,566 cannot be lessened by me, that the percentage of the valuation of the unit which the statute requires to be taken is not 35.15, as the board took it to be, but 24.9601, and that no addition can be made to the part of the value of the unit apportioned to Kentucky on the mileage basis on the ground that the part of the intangible part of the unit in Kentucky was more valuable than the mileage proportion of the value of such part, is that the value of such portion must be taken to be 24.9601 per cent. of $262,252,566, or $64,750,418.79. But this is so ap-
214 parently only. It is not really so, because the board, in reaching $262,252,566 as the value of the unit, did not value the whole of the unit. If there was more of the unit than what it valued, if what it valued was worth $262,252,566, and if 24.9601 was the proper percentage of the value of the unit to be apportioned to Kentucky—I have accepted the second and held the third condition to be true—then the value of the portion of the unit in Kentucky was not $64,750,418.79. It was more than such sum.

Is it true, then, that the board did not value the whole of the unit, and, if so, to what extent did it come short of so doing? To answer this question it is essential that we come to an understanding as to what the unit consisted of. To do this it is only necessary that we hark back to a conclusion we have already reached. It is a conclusion which plaintiff has urged upon me, and which I have accepted as sound. That conclusion is that the proportion which the part of the unit in Kentucky was of the whole unit was 24.9601. To determine what that proportion was, two things had to be known, to wit, the extent of the unit (i. e., the miles in it) and the extent of the part thereof in Kentucky (i. e., the miles in such part). It was found that the miles in the unit were 7,907.83, and those in the part of the unit in Kentucky were 1,952.45. And in obtaining these figures all the mileage operated, owned, leased, and controlled—altogether and in this state—was considered. The unit,

therefore, consisted of all such mileage. That such was the thought of the statute appeared from its provision that the board, after valuing the capital stock, should apportion to this state the proportion of such mileage in this state to the whole of such mileage.

Now the board, in valuing the unit, did not value the whole of such mileage. It valued only so much thereof as was represented by plaintiff's net income, or would have been represented by its stock and bonds, had that method of valuation been adopted. And that income, or those stocks and bonds, did not represent the whole of such mileage. It represented only such portion thereof as was represented by the stock and bonds of the separate organizations held by it, or as it held as joint owner or lessee. It did not represent such portion thereof as was represented by the stock and bonds of such organizations held by others, or its co-owners or colessees held. To the value of so much of the unit as the board valued—i. e., that portion thereof represented by its net income or its stock and bonds—it should have added the value of so much of the controlled mileage as was not so represented. Had it so done, it would have valued the whole of the unit. Not having so done, it did not value the whole thereof.

But it may be urged by plaintiff that to value more of the unit than so much thereof as was represented by its net income or stock and bonds would be to go beyond the statute. What the statute provides it shall value in the first instance is plaintiff's capital stock; i. e., all its property tangible and intangible. Such is undoubtedly the wording of the statute. But to confine one's self thereto is to stick in the bark. The words "capital stock" in the statute are not used in any technical sense; and I do not think that they are used in any other sense that the unit—a part of which the statute
215 provides shall be apportioned to Kentucky. To give them a restrictive meaning is to attribute to the Legislature an intention to provide that, in arriving at the percentage that is to be apportioned to Kentucky, the whole of the controlled mileage is to be treated as a part of the unit, as well as that operated, owned and leased, but in arriving at the value of that which is to be apportioned only a portion of the controlled mileage shall be considered, which necessarily would result in an undervaluation of that portion of plaintiff's unit in Kentucky. In my opinion in the other case I called attention to the fact that the statute under which the assessment in question was made was a crude piece of legislation, and I noted (209 Fed. 419, 420) a number of imperfections in it. The detailed consideration which I there gave it finds its justification in the fact that it makes one fair towards it in arriving at its true meaning. It was its intent that the board, in assessing the franchises of interstate units, should value the whole of the portion of such unit in this state. In order to do this it was essential that it consider the whole of the unit in valuing it, as well as in ascertaining the percentage thereof in this state. For it not to do so would be for it to omit a portion of the unit in this state, and undervalue the franchise.

In holding that it was the duty of the board to add to the valua-

tion of what it valued the value of that portion of the controlled mileage in which plaintiff had no interest, in order to arrive at the value of its unit, I am unable to see that any property out of the state will be imported into it and the Fourteenth Amendment violated. And I am not sure that an injustice has not been done to the state by the Legislature in plaintiff's case in requiring that controlled mileage should be considered as a part of its unit. There are not sufficient facts before me to enable me to form any opinion as to this.

This holding necessitates that the board shall take a step in addition to any that has heretofore been mentioned, and that is this: After valuing the whole of the unit, as I have indicated, and apportioning 24.9601 per cent. thereof to this state, it should, before deducting the assessed value of the tangible property, deduct the value of so much of the controlled mileage as is in this state; otherwise it will be considered twice in assessing franchises. It will be considered in the assessment of plaintiff's franchise and also in assessing the franchises of the separate organizations which own it.

I come, then, to the remaining attack made by plaintiff upon the board's action which has heretofore been referred to. It is that its finding that the value of the portion of plaintiff's unit in this state was $75,139,074 was contrary to the Fourteenth Amendment, in that thereby it was denied the equal protection of the laws. The way in which plaintiff makes this out is this: Property in this state generally—i. e., property subject to assessment by the county assessors, constituting the bulk of the property therein subject to taxation—was uniformly and intentionally assessed for the year 1913 at less than 60 per cent. of its fair cash value; whereas, the board, in valuing the portion of plaintiff's unit in this state in making the assessment of its franchise for that year, consciously adopted and applied
216 a much higher standard of valuation than 60 per cent., certainly as much as slightly less than or about 80 per cent., and possibly full fair cash value. The board has left it ambiguous—perhaps purposely so—as to which of two standards it applied in reaching that valuation. There is room to claim that it applied thereto the standard of fair cash value, notwithstanding it noted the fact that the valuation which it made was less—i. e., slightly less—than 80 per cent. of what it believed was its fair cash value. It stated that the reduction which it made from the sum of $94,500,000 to that of $75,139,074 was made in order to be "conservative," "out of abundant caution," and "that no injustice be done plaintiff in arriving at the value of its franchise." This would seem to mean that it was made in order that it might be sure that it was valued at its fair cash value and no more. If such is its meaning, then the standard applied was that of fair cash value.

In the other case, I attempted to show (209 Fed. 460, 461, 462) that the claim made before the oral argument on the motion for preliminary injunction by the defendants, through the affidavits of the members of the board as to the assessment of 1912, was that the standard applied was that of fair cash value, and the assessment for 1913 is substantially the same as that. Besides, from the beginning of this litigation down to the present time, defendants have claimed,

not only that the board had the right, but that it was its duty, to make the assessment at fair cash value and the members thereof would violate their oaths if they did not do so; and the Attorney General of the state so advised the board in the course of the making of the assessment for 1913. Yet, assuming that what the board really did was, after valuing the portion of plaintiff's unit at $94,500,000, to make a reduction therefrom to $75,139,074, it is not unlikely that it so did, if not to equalize plaintiff's assessment with that of other property, at least to render what it did imperious to attack on the ground that such property was uniformly and intentionally undervalued. In that case there is a touch of insincerity here in putting the matter as the board did and not saying expressly that the reduction was made for that purpose. In the answer herein the defendants claim that it was made for that purpose. If so, the standard applied by the board in valuing the portion of plaintiff's unit in Kentucky was slightly less than—or, as the answer has it, about—80 per cent., which is much higher than the standard claimed to have been applied in the assessment of other property.

The ground of the attack now to be considered may be taken to be that the board, in applying any standard above 60 per cent., adopted a fundamentally wrong principle. If, then, it be a fact that property generally in this state was so assessed, was the action of the board contrary to the Fourteenth Amendment? In my opinion in the other case I considered quite at length whether in such a case the amendment would be violated, and reached the conclusion that it would. The defendants, however, still contend earnestly and sincerely that this position is wrong. This and the desire to develop accurately just what is essential in such a case to constitute a violation of the amendment leads me to consider the matter afresh. I hope to be able to put it so lucidly and forcibly that it cannot but be accepted as
217 sound. I will first limit myself to the amendment itself and then consider the relevant decisions.

[3] It is impossible for one to see things just as they are and not otherwise, unless they are viewed from the right standpoint. The right standpoint from which to view an alleged violation of the Fourteenth Amendment is above its letter. It should be viewed from its real meaning. The letter of the amendment is that no state shall deprive or deny. Its real meaning is that no one who represents the state, acting for it and in its name, shall deprive or deny. This is its meaning, just as much so as it would have been, had it been so worded, instead of as it is. Such is its real meaning, because it cannot mean anything else; and it cannot mean anything else because, literally speaking, a state cannot act at all. Those representing it as officers or agents alone can act. The prohibition thus being against those representing the state as officers or agents, and not the state itself, it is against all such persons. It is not limited to the legislative department of the state government. It includes the executive and judicial departments as well. The positions thus taken find ample support in the following references, to wit: Ex parte Virginia, 100 U. S. 339, 346, 25 L. Ed. 667; Poindexter v. Greenhow, 114 U. S. 270, 290, 5 Sup. Ct. 903, 29 L. Ed. 185; C., B. & Q. R. R. Co. v.

Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; Raymond v. Chicago T. Co., 207 U. S. 20, 28 Sup. Ct. 14, 52 L. Ed. 90; Home T. & T. Co. v. Los Angeles, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510. The decision in the case of Barney v. New York, 193 U. S. 430, 24 Sup. Ct. 502, 48 L. Ed. 737, so far as it is to the contrary, is no longer in force. In the case of C., B. & Q. R. R. Co. v. Chicago Mr. Justice Harlan said:

"The prohibitions of the amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and therefore, whoever, by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.'"

What "laws," then are they the equal protection of which the legislative, executive, and judicial departments of the state are prohibited from denying? They can only be the laws which those departments have to do with and the only laws which they have to do with are the laws of the state in which they are such departments. And they are prohibited from denying the equal protection of such laws only in so far as they have to do with them. It cannot be that they are prohibited from so doing to any extent beyond this. The only connection which the legislative department has with the laws of the state of which it is such department is in their enactment. It has nothing to do with their enforcement. And the only connection which either the executive or judicial departments has with such laws is in their enforcement. Neither has anything to do with their enactment. What has thus far been said comes to this. The legislative department, in exercising its function of enacting the laws of the
218 state of which it is such department, is prohibited from denying the equal protection thereof; and the executive and judicial departments, in exercising the function of enforcing the laws of the state to which they belong, are prohibited from denying the equal protection thereof.

And what is it, then, to deny the equal protection of those laws? It is to refuse to grant or to withhold equal treatment in conferring or securing rights or in imposing or exacting performance of duties. It is to treat differently or to discriminate in so doing. And it may be said to include an intention, in doing what is done, to treat differently or to discriminate. But, if such is the natural consequence of what is done, it is to be taken that there was an intention to treat differently or to discriminate. One is always held to intend that which is the natural consequence of what he does. The essence of the Fourteenth Amendment, therefore, is to forbid discrimination and to require equal treatment on the part of each department of the state in the exercise of its particular function, and its effect is to empower and to make it incumbent on the courts, state and federal, to prevent discrimination and to secure equal treatment.

What has just been said, however, calls for some modification. In the case of Magoun v. Illinois Trust Co., 170 U. S. 280, 18 Sup. Ct. 594, 42 L. Ed. 1037, Mr. Justice McKenna, in referring to the equality of treatment which the legislative department in enacting the laws of the state is thereby required to give, stated that it is not a "rigid equality." It permits "many practical inequalities." The discrimination by such department which is forbidden is an arbitrary discrimination. A reasonable discrimination is not forbidden. But it is to be borne distinctly in mind that this freedom to discriminate is on the part of the legislative department, and that in the absence of any restriction on its power in the Constitution of the state. The legislative department, in so doing, has no such freedom, if its Constitution forbids, nor have the executive and judicial departments, in any case, any such freedom in enforcing such laws. Where the Constitution of the state forbids discrimination on the part of the legislative department in enacting its laws, I opine that a rigid equality—i. e., as much equality as the matter permits—is called for; and I see no reason why, if a rigid equality is not given, the Fourteenth Amendment is not violated, as well as the state Constitution. Equality is denied where no right to deny it exists. If there is a statement anywhere as to the equality of treatment which the executive and judicial departments must give in enforcing the laws of the state, it has escaped me. I would think that it is more rigid than that required to be given by the legislative department in enacting laws, where there is no restriction on its power in the Constitution of the state. Possibly it must be as much equality as the case permits; but possibly, also, it is sufficient if there is no intentional discrimination. Certainly an intentional discrimination is forbidden.

[4] These general statements as to discrimination forbidden and equality of treatment required should be applied to tax laws. So doing, we find that in the case of such laws we have an instance in which discrimination is not absolutely forbidden by the
219 amendment. In the case of Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616, Mr. Justice Miller said:

"The federal Constitution imposes no restraints on the state in regard to unequal taxation."

And in the case of Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, Mr. Justice Bradley said that the Fourteenth Amendment was not "intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways."

But, if the Constitution of the state forbids unequal taxation, the legislative department in enacting tax laws has no right to make a discrimination, and, as stated, if in such a case it does discriminate, I see no reason why its action would not be in violation of the Fourteenth Amendment as well as of the state Constitution. Thereby the equal protection of the laws of the state would be denied, and by reason of the Constitution of the state the right to discriminate which might otherwise exist has been taken away. Such a law might impose a tax of $1 on the $100 on an owner or the owners of one

class of property and 60 cents on the $100 on all other owners. No one would contend that in such a case the owner or owners of the class of property on whom the highest rate of tax had been imposed had not been denied the equal protection of the laws. Or it might take the shape of providing that the owner or owners of property of the one class should pay 50 cents on the $100 on an assessment thereof at its full fair cash value, and that all the other owners should pay the same rate on an assessment thereof at 60 per cent. of its fair cash value. No one would contend that in this case, as much so as in the other, the former owners were denied the equal protection of the laws. In the case of Bank v. Hines, 3 Ohio St. 15, as quoted by Mr. Justice Miller in the case of Cummings v. Merchants' National Bank, 101 U. S. 153, 25 L. Ed. 903:

"Taxing by uniform rule requires uniformity, not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation."

In the one case the denial would consist in prescribing the rate of taxation, and in the other in prescribing the rate of valuation of the property subject to taxation. So much as to the denial by the legislative department in the enactment of laws as to taxation. I pass therefrom to a denial by the executive and judicial departments—more particularly the assessing branch of the executive department, whose function is characterized as quasi judicial—in the enforcement of such laws by assessing property subject to taxation, and that where the Constitution and statutes of the state, as is the case here, require uniform taxation. It must be conceded that there is no such thing as perfect equality in the assessment of property for taxation. In the State Railroad Cases (92 U. S. 612, 23 L. Ed. 663) Mr. Justice Miller thus expressed himself on this subject:

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large state like Illinois, the application being made by men whose judgment and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

The inequalities due to the imperfections thus referred to cannot, therefore, be within the purview of the amendment. Those inequalities only can be within its purview which need not be; and such are inequalities due to intentional discrimination. The assessing department can refrain from such discrimination and thereby prevent

inequalities due to that cause. It must be accepted, therefore, that intentional discrimination on the part of that department is contrary to the amendment. Such, then, is the ultimate fact upon which a case such as we have here must turn.

[5] How, then, is such a discrimination to be made out? It is made out if it is established that the assessing department has adopted and applied a rule prescribing different standards of valuation of the property of different persons or different classes of property. The natural consequence of the application of such a rule is inequality and discrimination, and, as in law one is taken to intend the natural consequences of his acts, a discrimination so brought about is intentional. It may be made out by evidence that one class of property has uniformly been assessed at one degree of value and all other property at another. The fact of uniformity has to be accounted for, and there is no accounting for it except on the basis that a rule prescribing such degrees of value as the standard of assessment has been adopted and applied. In this connection the adverbs "systematically" and "habitually" are frequently used. I prefer uniformity. They all come to the same thing. Where the discrimination complained of is against a single owner of property, it is made out by evidence of an acknowledgment on the part of the assessing department that a rule prescribing the higher standard was adopted and applied, and of uniform assessment of all other property at a lower degree of value. If, then, in a given case it is established that the assessing department of the state has uniformly assessed the property of interstate railroad companies at fair cash value of slightly less than or about 80 per cent. thereof, and has uniformly assessed all other property at less than 60 per cent., a case of intentional discrimination against each railroad company and violation of the Fourteenth Amendment is made out; or that, in its assessment of the property of a single such company, it stated that the assessment was at its fair cash value, or slightly less than or about 80 per cent. thereof, the valuation conforming thereto, and has uniformly assessed all other property at less than 60 per cent., a case of intentional discrimination against such railroad company is made out.

Thus far I have proceeded on the assumption that the assessing department is administered by a single board or individual,
221 supposing that were possible. How is it in a case where, as in this state, the bulk of the property—i. e., all but the franchises of corporations having special privileges and distilled spirits—is assessed primarily by a county assessor in each county, with county boards of supervisors over each assessor, and a state board of equalization over the assessments of each county, and such franchises and distilled spirits are assessed by a state board of valuation and assessment? Clearly, if all having to do with the assessment of property in any way were to meet in convention at the state capital or elsewhere, and adopt a rule whereby all property assessable by the board of valuation and assessment, or portions thereof, such, for instance, as the franchises of corporations having special privileges, or those only of them which are interstate railroad com-

panies, or that of a single such company, was to be assessed at its full fair cash value, or slightly less than or about 80 per cent. thereof, and that all other property that was subject to assessment by the county assessors was to be assessed at 60 per cent. of fair cash value, and such rule was applied in making the assessment, the discrimination would be an intentional one, and contrary to the Fourteenth Amendment. But suppose no convention of or conference among any of the assessing officers is ever had, but each county assessor for himself adopts and applies a rule by which the property assessable by him is to be assessed at 60 per cent. of its fair cash value, either because he has heard of other county assessors having done so, or as a mere coincidence—a "developmental coincidence," resulting from the minds of the several assessors functioning the same way—which assessments are permitted to stand by the county boards of supervisors and the state board of equalization, and the board of valuation and assessment adopts and applies a rule prescribing full fair cash value, or slightly less than or about 80 per cent. thereof, as the standard in the assessment of the franchises of interstate railroad companies, or applies such a standard in the case of the assessment of a single such company, is there possible room for any one to claim that such a discrimination against such company or companies was not as much within the Fourteenth Amendment as if it had been brought about by the adoption and application of a single rule at a convention of all the assessing officers?

What reason is there for making a difference between a discrimination brought about by the conjunction of many separate rules and one brought about by a single rule? The discrimination is as much an intentional discrimination in the one case as in the other. And in such a case, if the property in each county was uniformly assessed at 60 per cent. of its fair cash value, and in the assessment of the franchises of interstate railroad companies the portions of the unit in the state were uniformly valued at full fair cash value, or at slightly less than or about 80 per cent. thereof, the reasonable inference would be that each county assessor and those over him had adopted and applied a rule to assess at 60 per cent. of fair cash value, and that the board of valuation and assessment had adopted and applied a rule to value at the higher rate. And if it were otherwise proven, as, for instance, by the statement of the board itself, that it had applied such rule in the case
222 of a single interstate railroad company, it would be the same as if it had been proven that it uniformly valued the portions of all such railroad companies, in making out a case of intentional discrimination against such single company. As, then, the Constitution and statutes of this state require uniformity of taxation, notwithstanding they also require that it be assessed at its fair cash value, I conclude that, if the property in this state subject primarily to assessment by the county assessors was uniformly assessed for the year 1913 at less than 60 per cent. of its fair cash value, and the board of valuation and assessment in assessing plaintiff's franchise applied as to the portion of its unit in this state as the standard of

valuation thereof full fair cash value, or slightly less than or about 80 per cent. thereof, it violated the Fourteenth Amendment. This conclusion is a deduction from a consideration of the Fourteenth Amendment itself. I have viewed the alleged violation thereof to determine whether it was such from the standpoint of the amendment's real meaning—above its mere letter—i. e., as if it had in so many words said, instead of that no state shall deny, that neither the legislative, executive, nor judicial departments of the state shall deny.

[6] I will now consider how the matter stands under the authorities. The relevant decisions in the order of their date are as follows, to wit: Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, 101 U. S. 158, 25 L. Ed. 903; Nashville, C. & St. L. Ry. Co. v. Taylor (C. C.) 86 Fed. 168; Taylor v. L. & N. R. R. Co., 88 Fed. 350, 31 C. C. A. 537; Louisville T. Co. v. Stone, 107 Fed. 305, 46 C. C. A. 299; New York v. Barker, 179 U. S. 279, 21 Sup. Ct. 121, 45 L. Ed. 190; Coulter v. L. & N. R. R. Co., 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; C., B. & Q. R. R. Co. v. Babcock, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636; Raymond v. Chicago Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Jersey City v. Central Railroad of New Jersey, 212 Fed. 76, 128 C. C. A. 532. The case of Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, and Taylor v. Louisville & Nashville Railroad Company go together. They are alike, in that in each relief was sought and granted against a discrimination in assessing property for taxation. In each, however, the ground upon which it was granted was that the discrimination was a violation of the Constitution of the state, which required uniformity of taxation, in the one case of the state of Ohio, and in the other of the state of Tennessee. In neither case was the bearing of the Fourteenth Amendment upon the discrimination considered. It may seem strange that it was not, and that more so in the Tennessee case. There the discrimination relied on was claimed in the bill to be in violation of the Fourteenth Amendment as well as of the state Constitution. Possibly it is to be accounted for by the fact that the discrimination as a violation of the amendment was not viewed from the right standpoint. But there was no real occasion for it to be considered as a violation of the amendment in either case. The federal courts, in which they originated, had jurisdiction irrespective thereof, in the one case because the plaintiff was a national bank, and in the other because of the diversity of citizenship between the parties. And the fact that the discrimination was in violation of the state Constitution was sufficient to entitle plaintiff to the relief sought without reference to that amendment.

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Mr. Justice Peckham, in the case of New York v. Barker, and defendants, following him, have erred in stating that the discrimination in the Bank Case was remedied because it was in violation of the act of Congress as to national banks; and I erred in my opinion in the other case in stating that the Railroad Case was based on the Fourteenth Amendment. In each case the relief granted was based on the

requirement of uniform taxation by the state Constitution. The Bank Case was brought by it to enjoin the collection of a tax assessed against the shares of its stockholders, which the statute required it to pay, to the extent of the discrimination. The Constitution of Ohio not only required uniformity in taxation, but that all property be assessed at its true value in money. The statutes thereof provided for the assessment of real and personal property, except bank shares, primarily by district and ward assessors in each county, for the correction of their work by county and city boards of equalization, and for the increase or decrease of the county valuation by a state board of equalization, the increase or decrease to be no more than 12½ per cent. There was no state board that had jurisdiction over valuation of personal property, except bank shares. The provision as to the assessment of bank shares was that they should be assessed primarily by the county auditors, and that a state board of equalization, different from the one having jurisdiction of the county valuations of real property should have power to equalize the valuation thereof throughout the state as among themselves. Prior to the assessment complained of the county auditor of Lucas county, in which plaintiff was located, and the county auditors of 10 other counties in that part of the state, had held a conference, at which it was determined that a rule should be adopted and applied in their respective counties by which real and personal property, except money and invested capital, was to be assessed at one-third of its actual value, and money and invested capital at six-tenths, and the assessors and county auditor of Lucas county had met and adopted this rule for that county, and thereafter they applied it in making the assessment. Presumably this happened in each of the other ten counties. Such a rule had been adopted and applied in another county in that part of the state, and Mr. Justice Miller said probably this system of taxation prevailed over the entire state. Under this rule plaintiff and the other Toledo bank shares were assessed at six-tenths of their actual value by the county auditor of Lucas county. But the assessment returned to him by the state board of equalization placed them at their true value in money. It would seem that they had so assessed all bank shares in the state. This was the discrimination complained of, and against which relief was sought and granted. Plaintiff and all other bank shares had been assessed by the state board of equalization at their full value, and real and personal property, except money and invested capital, at least in those 12 counties, had been assessed by the assessors thereof at one-third of its value. The burden of
224 plaintiff's complaint was that the statute providing for the state board of equalization of bank shares was in violation of the state Constitution, in that it limited its function to equalizing the valuation of bank shares as among themselves, and gave it no power to consider the valuation of real property and other personal property. But it was held otherwise, as inequality did not necessarily result therefrom. It was held, however, that the discrimination was not remediless. It was so held because of the discrimination in the rules of assessment applied by the county assessors and the state board of equalization of bank shares.

Beyond question it was an outstanding feature of the case that the application of the rule applied by the county assessors was the result first of the conference of the county auditors, and then the adoption thereof by the assessors and county auditors of the several counties. The state board had been no party to the adoption of that rule. But, though such was an outstanding feature of the case, there is no basis for claiming that it was an essential one. Had each assessor in the 12 counties, without previous conference with any other assessing official, acting for himself, adopted and applied such a rule, the result of the case could not possibly have been different from what it was. In such case the assessment of all real and personal property in the 12 counties, except money and invested capital, at one-third of its true value, of money and invested capital therein, except bank shares, at six-tenths thereof, and of bank shares therein at full value, and the resultant discrimination against the bank shares, would have been intentional. Mr. Justice Miller said:

"We are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power."

The only discrimination which the case recognizes as not being within the state Constitution and remediless is one that results from mistake of judgment and other sources of inequality which boards of equalization are designed to remedy. Still further, had nothing else appeared than that each assessor in the 12 counties had uniformly assessed the real and personal property, except money and invested capital, at one-third of its true value, and money and invested capital, except bank shares, at six-tenths thereof, and that the state board of equalization had uniformly assessed bank shares at their full value, the result could not possibly have been different. The reasonable inference would have been that this was the result of the adoption and application, separately at least, of rules to so assess such property.

It is to be noted that, without any evidence in the record bearing on the subject, Mr. Justice Miller observed that the assessment of real estate at less than its true value was not "limited to the state of Ohio, or to part of it"; that, though the Constitutions and statutes of nearly all the states require uniformity of taxation and assessment at actual value of all property subject to taxation, "it is a matter of common observation that in the valuation of real estate the rule is
225 habitually disregarded"; and that "it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value." He accounts for the existence of this condition of things by the effort of the landowner to produce something like equality of burden with personal property, especially invested capital, which so readily escapes taxation by removal or hiding.

The case of Taylor v. Louisville & Nashville Railroad Company was brought by the railroad company to enjoin the certification by

the state board of equalization of Tennessee, whose function was to revise the assessments of the property of railroad, telegraph, and telephone companies by another state board, to the comptroller for apportionment to the several counties into and through which its railroad ran. The Constitution of Tennessee required uniform taxation, but did not require that property should be assessed at its true value in money. It merely provided that it should be taxed according to value. The statutes, however, provided that all property should be assessed at such value. The assessment of all other property than that of such companies was made by taxing officers in each county. The state board assessed plaintiff's property at its true value in money, and the taxing officers of the counties uniformly assessed all other property at not more than 75 per cent. of such value. This was the discrimination complained of, and against which relief was sought and granted. Judge Taft in his opinion noted that there was conflict in the decisions of the state courts as to the right to relieve against such a discrimination. He cited decisions of the Supreme Court of Connecticut, New Hampshire, Arkansas, Illinois, and Kansas upholding the right, and decisions of the Supreme Courts of Ohio, New Jersey, and Massachusetts against it. He might have cited, as to the same effect, the decisions of the Kentucky Court of Appeals in the case of Louisville Ry. Co. v. Commonwealth, 105 Ky. 710, 49 S. W. 486, decided about a month before, had he known of its existence. He stated, however, that the court was concluded by the decisions of the Supreme Court of the United States in the Bank Case, had its opinion been to the contrary, which it was not. Two reasons were urged why the decision in that case was not controlling. One was that in the case in hand there had been no preconcert of the county taxing officers and adoption by them of a rule of undervaluation, as in the Bank Case. In answer to this Judge Taft said:

"It has been pressed upon us that no such preconcert of action by the assessing officers, and no such uniform rule of undervaluation, have been shown in this case as appeared in the Cummings Case, and that upon these circumstances the Cummings Case turned. We have already found, from the evidence, that there is an intentional undervaluation of property in each county, and that this is uniform as to all real and personal property, and results from a clear understanding between the assessors and county boards of equalization, who have a common motive for the reduction. More than this, it is clearly shown that the state board of assessors and equalizers in 1896 intentionally equalized all real estate in the state at 75 per cent. of its true value for taxation for the year 1897. Could preconcert be clearer than this?"

The other reason was that Mr. Justice Miller, in speaking of the rule of valuation whose adoption would justify equity in-
226 terfering, referred to it *was* one "which is designed to operate equally and to violate fundamental principles of the Constitution," and that in the case in hand it could not be said that the rule of undervaluation was so designed. In answer to this Judge Taft said:

"An intentional undervaluation of a large class of property, when

the law enjoins assessment at true value, is necessarily designed to operate unequally upon other classes of property to be assessed by other taxing tribunals, who, it may be presumed, will conform to the law. In the case at bar the county assessors and board of equalization * * * have been actuated in their violations of the law by the desire to reduce, as far as may be, their county's share of the state burdens. Their undervaluations of property have been uniform as to all property in their county but railroads. They could not but know that such undervaluation must work an injustice against the property of railroads, if assessed at its true value by a state board, and taxed for county and state purposes on that basis. In this sense, the rule of undervaluations adopted in each county is necessarily 'designed to operate unequally,' within the meaning of Mr. Justice Miller in the Cummings Case. The ratio decidendi of that case is to be gathered from the facts, and the language of the opinion is to be interpreted in the view of the facts."

The determining consideration for the court's relieving against such a discrimination, as Judge Taft put it, was that it was intentional. This appears from the quotations from his opinion already made, and more fully from the following. He said:

"Before equity will relieve in such a case, it must appear that the assessing officers, whose acts of undervaluation create the unjust burden, must intentionally and habitually violate the law, by assessing property at less valuation than that which they know to be its true value."

Again:

"Equity will not relieve against an assessment merely because it happens to be at a higher rate than that of other property; that such inequalities, due to mistake, to the fallibility of human judgment, or to other accidental causes, must be borne, for the reason that absolute uniformity cannot be obtained; that, in other words, what may be called 'sporadic cases of discrimination' cannot be remedied by the chancellor. He can only interfere when it is made clear that there is, with respect to certain species of property, systematic, intentional, and unlawful undervaluations for taxation by the taxing officers, which necessarily effect an unjust discrimination against the species of property of which the complainant is an owner. The reason for the distinction is obvious. The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one."

And again:

"If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at the full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from * * * fraud or intentional discrimination."

In each of these two cases the court was confronted with a dilemma. The Constitution of Ohio required both uniform taxation and assessment at the true value in money. The Constitution in Tennessee required uniform taxation, and the statutes thereof as-
227 sessment at the true value in money. The dilemma was as to which requirement would be enforced. Was the requirement as to uniformity to be enforced by leveling the higher assessment down to the lower, whereby uniformity would be secured, but no property would be assessed at its true value, or was the court to keep its hands off, whereby the assessments would be left as they had been made, so that, whilst there would be lack of uniformity, the assessments conforming to the requirement as to true value would stand? Compliance with both requirements could not be secured, because it was impossible to bring about a leveling of the lower assessments up to those of the higher. Mr. Justice Miller does not seem to have been conscious that he was confronted with such a dilemma, as he makes no reference to it. It was urged upon Judge Taft, and he deals with it. He undertook to show that, as compliance cannot be had with both requirements, the true course is to bring about compliance with the requirement as to uniformity by the leveling down process. He said:

"To enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident."

In neither case had the Supreme Court of the state taken position upon the question there involved. Whether, if it had, and the position was adverse to the right to relief against the discrimination, as the Court of Appeals of this State has done in such a case, it would have made any difference in the decisions, cannot be told from anything said in the opinions. Though this case, in view of this decision of the Kentucky Court of Appeals, has a feature in it that did not exist in either of these two, here the complaint against the discrimination is based on the Fourteenth Amendment, and not on the state Constitution, as there. If it so be that this complaint, therefore, has foundation in fact, this feature of the case, instead of being an obstruction to granting the relief sought, is an aggravation of the discrimination, and renders the granting of the relief more imperative, if that were possible. The Fourteenth Amendment only requires equality of treatment in the enforcement of the tax laws of states forbidding discrimination. It has nothing to say on the subject of assessing property at its true value. This makes it so that this court is not

confronted with the dilemma which confronted the courts in the Ohio and Tennessee cases, where the complaint against the discrimination was based on the state Constitution, which in the one case required that property should be assessed at its true value, as well as that taxation should be uniform, and in the other, together with the statute, so required. What we have here, then, in that con-
228 tingency, is an intentional discrimination, and the highest court of the state holding that it is powerless to remedy it in the only possible way in which it can be remedied, notwithstanding it is as much its duty as this court's to enforce the Fourteenth Amendment, the supreme law of the land.

The next of the relevant decisions to be considered are those in the cases of Nashville, C. & St. L. Ry. Co. v. Taylor and Raymond v. Chicago Union Traction Company. They go together. They are alike, in that in each case relief was sought and granted against a discrimination in assessing property for taxation similar to that complained of herein. The first one, as did the case of Taylor v. L. & N. Ry. Co., arose in Tennessee. The other arose in Illinois. The Constitution of that state does not require uniformity as to the members of each class. In that case the discrimination complained of was amongst the members of the class to which the traction company belonged. In each of these two cases the right to the relief sought was based solely on the ground that the discrimination complained of was a violation of the Fourteenth Amendment, and the claim that it was was the sole basis of federal jurisdiction. In neither was there diversity of citizenship, or other ground of federal jurisdiction than this. The Supreme Court of the United States in the Traction Company Case cited and approved the decision in the Railway Company Case, a decision of the Circuit Court. Though the decision of an inferior court, it has behind it the Supreme Court. These two decisions are on all fours with the case in hand, and uphold the position which I have been led to take. An attempt is made to distinguish the Traction Company Case, on the ground that there the assessment complained of had been directed to be made by the Supreme Court of the state. There is nothing in this to call for a difference in decision. Besides, though the assessment complained of here was not made by direction of the Court of Appeals of Kentucky, it has held that it is powerless to relieve against it. Mr. Justice Peckham, in the Traction Company Case, thus expressed himself as to what is essential to bring a discrimination of the kind involved here within the amendment:

"A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid, and provide for a proper valuation, yet if, through mistake on the part of the state, through its board of equalization and while acting as a quasi judicial body, the board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity."

Then came the decisions in Louisville Trust Co. v. Stone, Coulter v. L. & N. R. R. Co., and C., B. & Q. R. R. Co. v. Babcock. They go together They are alike, in that in each relief was sought against a discrimination in assessing property for taxation, similar to the one complained of herein, but it was denied The first two arose in Kentucky, and that after the adoption of the present Constitution of the state. The last one arose in Nebraska. The Constitution of
229 that state required uniformity of taxation. The sole ground upon which relief was sought against the discrimination was that it was in violation of the Fourteenth Amendment. Certainly in the first two, and not unlikely in the last one, the claim that it was was the sole basis of federal jurisdiction. The decisions in the first two cases, being Kentucky cases, may be thought to be of more significance here than any of the other relevant decisions cited. The ground upon which, in each of the cases, the relief sought was denied, was solely that the alleged discrimination had not been established by the evidence. In the case of Louisville Trust Company v. Stone it was more clearly recognized than in the other two that it came within the Fourteenth Amendment. Judge Day, now Mr. Justice Day, thus expressed himself on the subject:

"It may be conceded that, if the allegations of the bill are made out, there exists in respect to the property of complainant, and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the state, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Because of the position thus clearly expressed this case was also cited and approved by the Supreme Court in the Traction Company Case as in accord with the decision there rendered. By reason thereof the Supreme Court may be looked to as an authority in support of the position that the law as thereby expressed is applicable to this state in a proper case.

The opinions in the other two cases were written by Mr. Justice Holmes. If one may be justified in taking them as reflecting to a certain extent his own individual views, apart from those of the court itself, he cannot avoid thinking that Mr. Justice Holmes, at least, doubted whether such a discrimination as is alleged here was within the Fourteenth Amendment, and his dissent in the Traction Company Case, which followed shortly afterwards, would indicate that he thought that it was not. Certainly, in describing what was essential to bring such a discrimination within the amendment, he used terms which had not theretofore been used, and which were not repeated in the Traction Company Case. In the case of Coulter v. L. & N. R. R. Co., in referring to the undervaluation of property generally, constituting "one-half" of plaintiff's case, he said:

"It is not contended that a mere undervaluation would be enough. It is admitted that it must have been systematic and intentional."

Here the language used is familiar. But further on in the course of the opinion, he said:

"Inequality, we repeat, is nothing, unless it was in pursuance of a scheme."

Just what he meant by "in pursuance of a scheme" is not certain. If, however, what is here stated is put as the repetition of a thought theretofore expressed, it may be that he meant no more than what he had already intimated; i. e., that the inequality must have been brought about by a "systematic and intentional" undervaluation of such property. But in the case of C., B. & Q. R. R Co. v. Babcock he went further, and coupled the word "agreement" with "scheme." He there said:

"A point less pressed than the foregoing was that the other property in the state was greatly undervalued, and that thus the rule of uniformity prescribed by the Constitution of Nebraska had been violated. Upon this matter it is enough to say that no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the board of equalization and assessment."

If he meant by this language that something more than what I have heretofore pointed out was essential to bring such a discrimination as is relied on here within the amendment, I respectfuily submit that the position is not justified, either by reason or the authorities. And I cannot avoid the notion that his ideas on the subject were somewhat confused. I alluded to one of the indications of this in my opinion in the other case. He took note of the fact that the legislative department, in the exercise of its function of enactment of laws of taxation, is not held to a rigid equality, but may make reasonable discriminations, citing the authorities to that effect, seemingly as justifying the conclusion reached in that case. I would submit that this position has no relevancy whatever to the question whether the executive department of the state, where uniformity of taxation is required, in exercising its function of enforcing the tax laws of the state by assessing the property subject to taxation, may make a discrimination, and, if so, what discrimination it may make, which was the question involved in that case. Still further, he seems to have thought that a court having before it the question whether such a discrimination as is alleged here is a violation of the Fourteenth Amendment—which was the question he had there—is confronted with the dilemma which was put up to Judge Taft in the case of Taylor v. L. & N. R. R. Co., and which he considered and disposed of. He said:

"The railroad company contends that, when there is a uniform and general undervaluation of other property, then the only way in which the company can be put on an equality with other taxpayers is by a similar undervaluation in its case. The railroad company contends further that, although this contravenes the letter of the statute, the requirement of equality so far outweighs the requirement of a tax on the full value of property that, if by misconduct elsewhere both cannot be observed, the rule of equality must prevail."

And again:

"We may assume for purposes of decision, without deciding, that if we otherwise agreed with the railroad company's contention the injunction might be granted, although the franchise was valued as the law requires in every respect, except in the proportion which the assessment bore to the other valuations. The decisions are not agreed upon this point."

Now I would submit here that, though a court dealing with the question as to whether such a discrimination as is alleged here can be relieved against, when it is considered solely as a violation of the state Constitution, which also requires that property shall be assessed at its full value, as was the case in Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, and in Taylor v. L. & N. R.
231 R. Co., is confronted with such a dilemma, a court dealing with the question whether it can be relieved against as a violation of the Fourteenth Amendment, which has no requirement as to how property shall be assessed for taxation, but merely requires that there shall be no denial of the equal protection of the laws, is not confronted therewith. Besides these matters, Mr. Justice Holmes' dissent in the case of Raymond v. Chicago Union Traction Company seems to indicate that he viewed alleged violations of the Fourteenth Amendment from the standpoint of the letter thereof, and not from that of its real meaning, as I have claimed it to be. His position was that the doctrine of the case of Barney v. New York should be perpetuated, notwithstanding that it was open to the criticism which I ventured in my former opinion (209 Fed. 446 et seq.), which doctrine was subsequently condemned in the case of Home T. & T. Co. v. Los Angeles.

There are but two other of the relevant decisions cited above to be considered. Each stands by itself. That in the case of New York v. Barker is of consequence merely because therein the Supreme Court assumed the position here taken to be sound. It involved the question whether the legislative department of the state had denied the corporations thereof the equal protection of the laws, in that a certain statute enacted by it afforded an opportunity for discrimination. It was held that it had not. Having thus decided, the court proceeded to consider whether a case was made out of such a denial by the assessing department of the state in enforcing its tax laws. It assumed that such a denial could be, but held that it had not been, made out. An indication of what was thought would be such a denial may be gathered from these words of Mr. Justice Peckham, to wit:

"To raise the question which the plaintiff in error seeks, it was therefore obviously necessary to allege and prove as a fact that there was habitual violation of law by undervaluation."

According to this all that was necessary to make out a case was proof that plaintiff's property had been assessed at its full value and that in case of other property there was "habitual" undervaluation. The case modifies somewhat Mr. Justice Miller's statements in the Bank Case, tending to support the position that the court will take judicial notice of uniform undervaluation of real estate. It holds that it will not, and that it is a matter of proof like any other fact.

The defendants cite this case as bearing on this point, but are unwilling to accept its assumption.

As to the decision in the case of Jersey City v. Central Railroad of New Jersey—a decision of the appellate court of the third circuit—it is not important to make further reference to it than to state that it was held therein that such a discrimination as is alleged here is contrary to the Fourteenth Amendment.

The result of this survey of the relevant decisions is to make good the position which I have deduced from a consideration of the Fourteenth Amendment by itself, and which I took in the other case. Those who want to may contend otherwise, but in so doing they will be butting their heads against a stone wall. And just here I
232 would change a position taken in the other case (209 Fed. 455). It is that it was the assessing officers, who had to do with the assessment of property subject to assessment by the county assessors, and not the board of valuation and assessment, which had denied plaintiff the equal protection of the laws, if the discrimination charged was made. I would take that back. Undoubtedly those assessing officers, in not assessing such property at its fair cash value, breached their duties, and thereby made it so that, if a higher standard of valuation was used in assessing plaintiff's property by the board of valuation and assessment, an injustice would be done it. Had they done their duty, less taxes would be required, which would call for a reduction in the rate of taxation, which, if made, would cause plaintiff to pay less on a valuation of its property at fair cash value. But it was not they who denied plaintiff the equal protection of the laws. It was the board of valuation and assessment. It had no right to value plaintiff's property at a higher rate than that at which it was reasonable for it, with the evidence before it, to believe such other property was assessed. There was nothing in the oaths which its members took to require that it should so value it. The federal Constitution is the supreme law of the land, and they, as well as all other persons within its jurisdiction, owed obedience thereto over and above everything else. And that it assessed the capital of banks at 80 per cent. of par value would seem to indicate that it did not think that it was imperative on it to assess plaintiff at any higher rate.

What, then, is the fact as to whether there was an intentional discrimination against plaintiff in the assessment for 1913? In determining what is the fact in regard thereto, there can be no question that the board, in valuing the portion of plaintiff's unit in this state, consciously adopted and applied the standard of at least slightly less than or about 80 per cent. of fair cash value, in placing it at the sum of $75,139,074—that of full fair cash value being the standard in placing it at $94,500,000—and possibly the standard of full fair cash value in placing it at the lesser sum. Which it was depends on the true construction of its minute. It was one or the other. How, then, is it as to the other half of the case which it is essential that it be established to make out the discrimination alleged, and one which comes within the amendment? At the outset of this litigation it seemed to be conceded that the property sub-

ject to assessment by the county assessor was uniformly undervalued and that to a substantial degree. This led me in the other case (209 Fed. 460) to say:

"Progress, therefore, has been made along the line of truthfulness since 1902. No longer do the courts have to contend with the sham and pretense that ordinary property in this state is assessed at its fair cash value, or substantially so."

But it seems that such is not now the case. The defendants have denied the allegations of the bill to this effect, and insist that these allegations have not been established by the evidence. The plaintiff, on the other hand, contends that there was no occasion to so establish them, as the court takes judicial notice of the truth of those allegations. It cites in support of this position the
233 following decisions, to wit: Cummings, Treas., v. Merchants' National Bank of Toledo, Ohio, 101 U. S. 162, 25 L. Ed. 903; Railroad & Telephone Cos. v. Board of Equalizers (C. C.) 85 Fed. 308; Wray v. Knoxville, etc., R. R. Co., 113 Tenn. 544, 82 S. W. 471; Miller v. Windsor Water Co., 148 Pa. 529, 23 Atl. 1132. It thinks that I committed myself to this position in the other case when I said, in referring to the case of Coulter v. L. & N. R. R. Co., supra (209 Fed. 457):

"I confined myself in that case entirely to reasoning from the facts in evidence. I might have been justified in saying then, as now, that it is a matter of common knowledge to any one living in this state with a reasonable acquaintance with its affairs that such is the case."

But I did not mean thereby to so commit myself. And the decision of the Supreme Court of the United States in the case of New York v. Barker, where what Mr. Justice Miller had to say in the Bank Case was qualified, would seem to be against it. Possibly the true position is that judicial notice will be taken of the fact that such property is uniformly undervalued for assessment purposes, but not of the extent of the undervaluation. This must be established by evidence. In Coulter v. L. & N. R. R. Co. Mr. Justice Holmes said:

"There is, no doubt, a natural inclination to think such an undervaluation probable when it is suggested."

I will therefore determine the question under the evidence. Evidence was available, but not presented, which it seems to me would have settled beyond question the truth, not only as to the fact of undervaluation, but as to the true percentage thereof. The Constitution and statutes of this state prescribe as a test of the fair cash value of property therein the price which it will bring at a fair voluntary sale. The Constitution of Illinois, quoted in Raymond v. Chicago Union Traction Company, prescribes the same test. The statute of New York, quoted in New York v. Barker, prescribes as the test of the full and true value of property what it would be appraised at in payment of a just debt from a solvent debtor. Now both of these tests are to a certain extent uncertain. Is the price which a given piece of property will bring at a fair voluntary sale the test, or what will it be appraised at when taken in payment

of a just debt from solvent debtor? Fair-minded and reasonable men will differ as to this. But in case of real estate which has been sold at a fair voluntary sale the test of what it will sell for is no longer needed. The price at which it actually sold fixes its fair cash value, in the absence at least of any exceptional circumstances, and that price should appear from the record of the deed of conveyance. If, then, as to such property, its assessed value is compared with its fair cash value, as thus fixed, it can be determined at once with certainty whether it was assessed at its fair cash value, and, if not, the percentage thereof at which it was assessed. By taking into consideration all such property which has been sold in a given county during the year, the average percentage at which it was assessed can be obtained. It is a fair inference therefrom that the real estate which was not sold during the year was assessed at the same average percentage of its fair cash value, and that personal property was assessed at no greater percentage. It is this
234 evidence, to wit, evidence of the percentage at which all real estate which was sold in each of the counties of the state during the year 1913 was assesed, to which I refer.

Two hindrances no doubt existed in the way of this evidence being effective. One hindrance is this: Tabulated statements are required by statute to be furnished each year to the board of equalization by the county clerks of the sales of real estate during the year, the consideration therefor named in the deeds, and the assessed values thereof, in order that it may have such evidence as it furnishes of the percentage of cash value at which property in each county is assessed. To prevent the state board from increasing the assessments of the counties by reason of the showing made under these statements, it is the practice of the county assessors, as to which there is abundant evidence in this record, to assess the property sold during the year at a much higher percentage of its value than it had been theretofore and would be thereafter assessed. This hindrance could have been met by evidence as to the amounts at which the property sold had been assessed the preceding and succeeding years to that in which it was sold. The other hindrance is connected with the other term of the comparison, to wit, the consideration for which the sale was made. In many instances, no doubt, the conveyances would not disclose the true consideration, and this for the purpose of preventing a raise in the assessment. This hindrance could have been met by the testimony of the parties to such conveyances as to true consideration. To have presented this evidence in full would have necessitated the expenditure of much time, labor, and money; but the amount involved in this and its companion cases would have justified the expenditure. Saul lost his kingdom for want of thoroughness. He would save Agag and the choicest stock. And if the Germans do not save theirs it will not be for the want of this great quality. I do not overlook the fact that in the case of Coulter v. L. & N. R. R. Co. Mr. Justice Holmes seems to belittle the showing made by the tabulated statements furnished by the county clerks to the state board of equalization as bearing on the fact of undervaluation and the extent of it. He there said:

"It is obvious that the accidental sales in a given year may be a misleading guide to average values, apart from the testimony that some at least of the conveyances did not report true prices, yet they furnish the chief weapon of attack."

It is true that in one direction they were a "misleading guide," and the fact that all conveyances did not report true prices was against their effectiveness. But the direction in which these two considerations affected the value of this evidence was not to prevent the statements showing that the percentage of assessment to fair cash value was really greater than shown thereby, but to prevent them showing that it was really much less. It could be relied on without the slightest hesitation that the percentage was not greater than that, but that it was much less. These two weaknesses in the showing made by the comparison of the prices for which the real estate sold and the assessments thereof would be removed by the evidence to which I
235 have alluded, to wit, of the assessments for the preceding and succeeding years and the testimony of the parties to the conveyances. With these weaknesses removed, such a comparison would give a definite and certain percentage of assessment to fair cash value. It is not possible to obtain a definite and certain percentage in any other way. A boom or a depression in a given year may make the comparison misleading for that year, so that some allowance would have to be made for this. But for years in this state there has been no such disturbing cause. The value of such a comparison in determining the percentage of assessment to fair cash value was recognized by the Legislature of Kentucky, in that it provided that the tabulated statements, notwithstanding the two weaknesses referred to, which worked against the state, should be prima facie evidence of the true percentage. And the present Constitution would seem to have had them in mind when it for the first time in this state prescribed the prices at which property would sell at fair voluntary sale as the test of its fair cash value.

Coming, then, to the evidence which has been introduced, what do we find? Several considerations which I made much of in the case of L. & N. R. R. Co. v. Coulter, my opinion in which is reported in 131 Fed. 282, I think can be availed of here. Down at least to the year 1906 there was legislative recognition of the fact that property generally in this state was not assessed at exceeding 70 per cent. of its fair cash value. In the opinion referred to I gave a historical survey of the legislation in Kentucky as to the assessment of property for taxation. It appears therefrom that down to 1886 the provision was that property should be assessed at its fair and full value, and then for the first time it was provided that it should be assessed at its fair cash value. In 1831 it was provided that the taxpayer should make oath to the value of his property. But this requirement did not remain long in force. It was repealed in 1838. And as I read the statutes it was not again required until 1886, when it was first prescribed that property should be assessed at its fair cash value. It was required, at the same time, that the assessors before beginning their work should make oath that they would assess, and again, after they finished their work and before they could receive their pay, that

they had assessed, the property subject to assessment by them at its fair cash value, and that the members of the county boards of supervisors, before beginning their work should make oath that in each instance where property had not been assessed at its fair cash value they would make the assessment conform thereto. No such oaths on the part of the assessors and members of the county boards of supervisors had theretofore been required. They had merely been required to make oath before beginning the performance of their duties that they would faithfully perform them. Why the necessity of this stringent legislation? How is it to be accounted for? It is not to be accounted for save on the ground that property in the state was not being satisfactorily assessed, and something stringent was needed to bring about a satisfactory assessment. This stringent legislation is a witness to this much at least. That such a condition of things existed is also witnessed about this time by the Court
236 of Appeals of the state in the case of Spalding v. Hill, 86 Ky. 656, 7 S. W. 27, decided February 11, 1888, just shortly after the state board of equalization was first created. Judge Bennett there said:

"It is the settled doctrine of this state that, for the purpose of taxation, property must be assessed according to its true value; * * * that equality of burden is essential to the correct administration of the government. But it is a fact, known by all, that for years past the grossest inequalities have existed in the value fixed upon all kinds of property by the county assessors, and that the county boards of supervisors have failed to correct the evil. In some counties it is said that assessors secure their election by pledges made to assess the property in the county, or certain kinds of it, at a low value. In creating the state board of equalization, the object was to correct this evil, and to have the assessment of taxes in the several counties equalized according to the value * * * therein, so that the state government might be supported by just and equal taxation."

Possibly this stringent legislation witnessed also a desire that property should be, and an expectation that by reason thereof it would be, assessed at its fair cash value. But the evidence is clear that, however it may have been as to the desire there was no expectation whatever that it would have any such effect. By the act of May 4, 1888, with these stringent provisions in the statutes, it was provided right alongside of them that the state board of equalization should adopt 69 per cent. of fair cash value as the standard to which the county assessments were to be made to conform, and in order that it might be in a position to know how far the assessments conformed to this standard it was for the first time provided that the county clerks should furnish the tabulated statements heretofore referred to. As stated, it was provided that they should be accepted as prima facie evidence of the percentage of fair cash value at which the assessments were made, provision being also made for hearing witnesses. By the act of May 27, 1890, the percentage was changed from 69 to 70. The effect of this legislation is to show that the expectation as to the stringent legislation referred to could have been no more than that the effect thereof would be to raise the assessments to as much

as 70 per cent. Such was the condition of things at the time of the adoption of the present Constitution, which incorporated into it the requirement that property should be assessed at its fair cash value. Mr. Justice Holmes in the case of Coulter v. L. & N. R. R. Co., seems to have thought that the legislative recognition that property in this state was assessed at not more than 70 per cent. of its fair cash value was confined to the time before the adoption of the Constitution. He said:

"The state Constitution, whatever the statutes may have said, seems popularly to have been understood to have made a great change in the law. Practice before its adoption, therefore, hardly can raise a presumption as to practice afterwards, even on the liberal assumption that it properly could be considered in evidence."

Beyond question the Constitution made a great change in the law. Thereafter the Legislature could not, as before, prescribe anything less than fair cash value as the standard of assessment. There must have been something in the record, not appearing in the opinion, to justify the statement that it seems to have been popularly
237 understood that the Constitution had that effect; and it may be accepted that there was no presumption that practice before the Constitution continued afterwards. I cannot see, however, why it was a liberal assumption that former practice could be considered in evidence at all. One of the recognized methods of criticism in determining the truth of things is to consider them genetically. And it would seem not to require much evidence to convince one that the mere adoption of the constitutional provision did not have effect of changing the settled habit of the people of the state as to the assessment of property for taxation. From the beginning the statutes of the state had prescribed that property should be assessed at its fair and full value. This legislation was binding on the taxpayers thereof as much as the constitutional provision. The Legislature, in providing that the state board of equalization should equalize the assessments of the several counties on the basis of 70 per cent. of its fair cash value, indicated that it did not think that the requirement as to so much oath taking would increase the assessment beyond 70 per cent. of its fair cash value. In view of these considerations, is not the case quite weak for thinking that the mere embodiment of the requirement that property in the state should be assessed at its fair cash value would affect any material increase in the rate at which it was assessed?

But the legislative recognition that property in this state was assessed at no more than 70 per cent. of its fair cash value is not limited to the time before the adoption of the Constitution. The effect of the constitutional provision, of course, was to repeal the statutory provision as to equalizing the assessments on such basis. Immediately after the adoption of the Constitution, and because thereof, a long session of the Legislature was held, lasting nearly a year, to make the statutes of the state conform thereto. Most of them, with certain modification, were re-enacted. Amongst other statutes then enacted was a comprehensive one on the subject of "Revenue and Taxation," which went into force November 11, 1892. It contained the

stringent provisions of the preceding legislation as to oath taking by the taxpayers, county assessors, and members of the county boards of supervisors, with the additional requirement that that of the taxpayer should be in writing and signed by him. This statute covered the entire subject, except in one particular. It omitted anything as to the state board of equalization. It left that matter to be still covered by the preceding legislation, which contained the requirement that the board should equalize the assessments of the various counties at 70 per cent. of fair cash value. Why the omission? Of course, one cannot tell for certain what was the reason thereof. Could it have been that, that Legislature's special function being to make the statutes of the state conform to the new Constitution, it could not see its way clear to provide that the state board of equalization should equalize on the basis of 70 per cent. of fair cash value, and yet it was not ready to provide that it should do so on the basis of fair cash value, either because it was not desired that it should do so, or it was thought to be useless to require it to do so? But so it was that it left this legislation unaffected by any act on its part.

238 Matters continued in this condition until the act of March 29, 1902. The special function of the Legislature which enacted it was not to make the statutes conform to the Constitution, and it was 10 years away from its adoption. That act also was a comprehensive one on the subject of "Revenue and Taxation." It covered the whole of it. It re-enacted the stringent provisions of the former act as to oath taking, and right alongside of it the legislation as to the state board of equalization in existence before the adoption of the new Constitution, with its provisions that that board should equalize the county assessments on the basis of 70 per cent. of fair cash value. This act remained in force until March 16, 1906, when another comprehensive act on the subject was passed, which is still in force. This was the first Legislature after the termination of the litigation in Coulter v. L. & N. R. R. Co., and then for the first time this requirement as to equalizing on such basis was changed, and that in awkward fashion (section 4274, Ky. Stat.), so as to require the equalization on the basis of fair cash value. The effect of this legislative recognition is not only to support the position that the assessments for 1913 could not have been for more than 70 per cent. of fair cash value, but to knock the props from under the only consideration appealed to by defendants to support the position that they were for as much as full fair cash value. That consideration is that, in view of the requirements as to so much oath taking in connection with the making of the assessments, it is to be presumed that they were at full fair cash value. No such presumption can be indulged in, in the face of that right alongside of these requirements there existed for 20 years the legislative provision that the state board of equalization should equalize the assessments of the various counties on the basis of 70 per cent. of fair cash value.

Again, the comparisons which I made between the total assessments for the year 1902 and those previous to the adoption of the

Constitution, and the showing made by the tabulated statements, which I took great pains to demonstrate, are not without some force here. There had been but little increase in those assessments in that time. And, doctored as those statements had been, they evidenced that property in the state had not been assessed at more than 80 per cent. of fair cash value. I have heretofore noted that Mr. Justice Holmes indicated that he was impressed by the force of my reasoning to the effect that property generally in the state was uniformly undervalued, and that substantially so. But, of course, if there was nothing more here than what was in that case, I could not, in the face of the decision of the Supreme Court in that case, take any such position here. The case in hand is not limited thereto. It contains much more than this in support of that position. I will simply enumerate the additional evidence, without elaborating on any item.

1. The United States census for the year 1910. In my opinion in the other case I noted that according to it the assessed value of farm property in this state, consisting of land, buildings, machinery, implements, and live stock, was 51.6 per cent. of the cash value. According to that of 1900, the percentage was 63, indicating that in the decade there had been an increase in the cash value,
239 with no corresponding increase in the assessed value. From a comparison of certain details of the census of 1910 with the report of the state board of equalization for the year 1913 as to the same details we have this result: The census gives the value of farm lands, with improvements, as $635,459,372; the report gives the assessed value thereof as $355,285,669. The assessed value thereof for 1913 was 55.9 per cent. of its true value in 1910, three years before. The census gives the value of live stock as $117,486,662; the report gives the assessed value as $57,318,478, or 48.8 per cent. of the true value thereof three years before. The census gives the value of agricultural implements and vehicles of all kinds as $20,851,846; the report gives the assessed value thereof as $8,921,889, or 42.8 per cent. of the true value, thereof three years before. The Report of Wealth, Debt, and Taxation issued by the Census Bureau in 1907 states that farm lands and improvements in this state constituted 52.872 per cent. of the value of all taxed real property and improvements. If this be accepted as the correct percentage, and the valuation of farm lands and implements given by the census for 1910 as the true value thereof, then the true value of all taxed property and improvements for that year was $1,201,822,607. The report of the state board of equalization for the year 1913 gives the assessed values thereof as $647,603,715, or 53.882 per cent. of the true value of the whole three years before.

2. The report of the state board of equalization to the Governor for the years 1910, 1911, 1912, and 1913. I quoted certain portions of the reports for the years 1910 and 1911 in my former opinion (209 Fed. 458, 459). They are all illuminating of true conditions in this state as to the matter of assessing property for taxation. The report of 1911 shows a real effort on the part of the board for the years 1910 and 1911 to raise the assessments. It

raised the assessments in 1911 more than $22,000,000 over what they were the year before. The succeeding boards for 1912 and 1913 fell back in 1912 a little under $6,000,000, and went ahead of the assessment for 1911 about the same amount in 1913.

3. The report of the state tax commission, appointed under a joint resolution adopted by the Legislature and approved March 15, 1912, to that body made in December, 1913, after having been at work for nearly two years. The commission stated that the average ratio of assessed value to true value of farm lands throughout the state was about 52 per cent., and further that "no pains had been spared to ascertain the correct figure." Evidently the commission accepted the census of 1910 as the basis of its work and verified it. It found, not only the average ratio for the state, but the ratio for each county. There were at that time 119 counties in the state. It found that in all of them the ratio was between 30 and 40 per cent.; in 38 between 40 and 50 per cent.; in 44 between 50 and 60 per cent.; in 13 between 60 and 65 per cent., most of them nearer 60 than 65 per cent.; in 3 between 65 and 70 per cent.; in 6 between 70 and 75 per cent., most of them nearer 70 per cent. than 75 per cent.; in 3 between 75 and 80 per cent.; and in one 80.6 per cent.

4. The testimony of John E. Garner, a member of the
240 state board of equalization for the years 1908, 1909, 1910, and 1911, and its chairman and author of its reports for the years 1910 and 1911. His testimony was that the practice of the assessors was to assess real estate—lands and town lots—at from 40 to 50 per cent. of fair cash value; that as to personal property it "was more a matter of escaping taxation than paying taxes"; and that the board endeavored to raise the assessment to approximately 60 per cent. of its value.

5. The affidavits of about 190 individuals, men of affairs, from 47 counties in different parts of the state. They place the percentage of assessed value to fair cash value in their respective counties mainly at 60 per cent. Some of them place it lower than 60 per cent. and some as low as 15 per cent. As to only one county is the percentage placed higher than 60 per cent., and in that instance the percentage is placed at from 60 to 70.

6. The action of the board of valuation and assessment in assessing the banking capital of the state. It assessed it at 80 per cent of par value, which not unlikely is not more than 60 per cent. of fair cash value. This action shows, not only that the board discriminated in its own work, assessing plaintiff at slightly less than or about 80 per cent. of possible full fair cash value, and the banks at 80 per cent. of par value, but tends to establish undervaluation claimed to exist of the property subject to assessment by the county assessors. This assessment cannot be accounted for on any other ground than that it was thought that banking capital should not be assessed at a higher percentage than such property is.

7. The action of the Attorney General of the state in filing before the board of valuation and assessment, when considering the assessment question herein, affidavits of certain individuals from eight

different counties of the state, including the counties of Jefferson, Kenton, and Fayette, in which are located the cities of Louisville, Covington, and Lexington, the assessment of which counties cover more than one-third of the total assessed value of property in the state subject to assessment by the county assessors; and those affidavits were to the effect that property in those counties was assessed at 80 per cent. of its fair cash value. I am not now concerned with the question as to the percentage at which such property was undervalued, but with the question whether it is uniformly undervalued to a substantial degree. This item of evidence is to the effect that it was undervalued at least to the extent of 80 per cent.

Now as against this evidence the defendants have not introduced one particle of conflicting evidence. The only evidence which they have introduced consists of the affidavits of ex-county assessors for the years 1910, 1911, 1912, and 1913 from over 90 counties. With three exceptions they are of a stereotyped character. All but one were evidently prepared by some one acting on behalf of defendants, and distributed to be signed and sworn to by ex-county assessors of the state for those years. In all but the three each affiant states that he endeavored to follow the law and assess all property at its fair cash value, estimated at the price which it would bring at a fair vountary sale; that if any property was assessed at less than such fair
241 cash value it was unintentional on his part; that never at any time had he entered into any agreement or understanding with any other officer in the state whose duty it was to assess property for taxation, or any one else, that property should be assessed at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and that he never heard of any such understanding or agreement; and that no property was ever intentionally assessed by him for less than such fair cash value, and, if he so assessed any property, it was on account of mistake or lack of proper evidence as to its value. In none of them did the affiants negative the fact that the property assessed by them had been uniformly undervalued.

The absence of any evidence of this character from this case is striking when we come to compare it with the other cases in which the question of uniform undervaluation in this state has been involved. As has been seen, there are two of such other cases, to wit, Louisville Trust Co. v. Stone and Coulter v. L. & N. R. R. Co. In Louisville Trust Co. v. Stone the evidence to the effect that property was assessed at its fair cash value was quite formidable, as will be seen from Judge Day's opinion therein. The affidavits of 95 county assessors, 114 county clerks, 4 members of the board of equalization, and the chief secretary of the board were to the effect that the property in the state was so assessed. In Coulter v. L. & N. R. R. Co. the evidence to this effect was less formidable; and in this case there is an entire absence of any such evidence. This indicates that the fact of uniform undervaluation to a substantial degree has become so bald and patent that no one can now be found that will swear to the contrary. Those who would perpetuate the sham and pretense that property generally in this state is not uniformly and intenti ally undervalued to a substantial degree nd would have the court sanc-

tion its perpetuation, have withdrawn entirely from the objective field, save in the particular as to the existence of an agreement amongst the county assessors, which no one claims, and entered the subjective, where it may be thought that it is more difficult to determine the truth.

The evidence in the case, therefore, seems to be sufficient to convince any one of the truth of plaintiff's claim that the property in this state subject to assessment by the county assessors for the year 1913 was uniformly undervalued to a substantial degree. It is equally convincing that such undervaluation was intentional on the part of the ex-county assessors, notwithstanding the affidavits to the contrary. It was hardly to be expected that they would admit that they had intentionally undervalued the property assessed by them, and had not endeavored to assess it at its fair cash value, thereby acknowledging of record that they had violated their oaths. Nor would I say that in stating that they had not intentionally undervalued, and had endeavored to assess at fair cash value, they deliberately swore to that which they knew to be untrue, though it is quite difficult to see how, if they reflected on the matter, they could persuade themselves that they were speaking the truth. It is likely that none of them duly reflected upon the full effect of what they were swearing to, and that, in so far as they reflected at all, they in some way persuaded themselves that in some sense it was true, or at least not false.

242 The fact of uniform undervaluation is so overwhelmingly established and to such a marked degree that it would be a reflection on one's capacity to see things as they are not to hold that the undervaluation was intentional. The real truth crops out from this quarter. One of the ex-county assessors to whom the stereotyped form of affidavit was sent came from Warren county. He interlined it so as to make it state that he endeavored to assess property at about 70 per cent. of its fair cash value, that if any one was assessed at less than 70 per cent. of its fair cash value it was unintentional, and that no property was ever intentionally assessed by him for less than 70 per cent. of its fair cash value. Another was the ex-county assessor of Carroll county. He put it in the waste basket and prepared an affidavit for himself. In it he stated that he assessed all real estate that was on the transfer sheet—that is, all that had been sold during the year just previous to the assessment—at 80 per cent. of its purchase price as shown by the records, and all other property was listed by the owner or agent under the oath prescribed by law. And still another was the ex-county assessor of McCracken county. He added thereto the statement that he tried to value all property fairly and equitably, and that in some instances property was assessed at less than he thought was its fair cash value, but he let it stand because it was assessed in his opinion as other property in the same neighborhood.

This leaves nothing to be determined but the percentage of fair cash value at which such property is uniformly assessed; and as to this I see no escaping the conclusion that it is not assessed at more than 60 per cent. thereof.

It remains to determine the effect of the conclusion that, in the

making of the assessment for 1913 of plaintiff's franchise, there was an intentional discrimination against it within the Fourteenth Amendment, in connection with those heretofore reached, upon the relief, if any, which the plaintiff is entitled to herein. We have seen that, assuming $262,252,566 to be the true cash value of plaintiff's unit, as the board found it to be, 24.9601 to be the true percentage of the fair cash value of plaintiff's unit to be apportioned to Kentucky, and the portion of Kentucky's unit therein not to be of greater value than the mileage proportion of the value of the unit, the latter two of which assumptions I have held to be correct, the fair cash value of the portion of plaintiff's unit in Kentucky was $64,750,418.79. Sixty per cent. thereof is $38,850,251.12. Deducting therefrom $29,500,772, the assessed value of the tangible property, leaves $11,349,479.27 as the value of the franchise, which is about the amount of the assessment for 1911, and less than half of the amount on which payment has been made. But, if $262,252,566 was the fair cash value of what the board took to be plaintiff's unit, the fair cash value of its unit was more than this sum. Plaintiff's unit consisted of more than what the board took it to be. It consisted, in addition thereto, of so much of the controlled mileage as was not represented by the stock and bonds owned by plaintiff. Adding the value thereof to the sum of $262,252,566, and then taking 24.9601 per cent. of
243 the total, deducting therefrom the value of the controlled mileage in Kentucky, taking 60 per cent. of the remainder, and deducting the assessed value of the tangible property, would, as I view it, give the value of the franchise according to the statute. I am unable to make out its value in this way, because there is nothing in the record to show the value of the portion of plaintiff's unit not considered by the board, or the value of that portion of its controlled mileage which was in Kentucky. It is possible that the result of a consideration of these two matters, in the way indicated, would make the value of the portion of plaintiff's unit in Kentucky as much as $92,181,766, the sum at which the board fixed it, by apportioning to Kentucky a part of the value of $262,252,566 on the operated on its own account mileage basis. I doubt, however, whether it would.

The condition of things, then, is this: The board has found the fair cash value of the portion of plaintiff's unit in this state to be $92,181,766, without any excess value. They have not gone at it in the right way. But they have in fact found such to be its value. It is possible that, if they had gone at it in the right way, they would have found such to be the value thereof. And the consideration to which I referred to in the other case (209 Fed. 463), to wit, that the plaintiff on June 30, 1905, in a suit in this court, claimed that the portion of its railroad in this state, then consisting of 1,265.23 miles, was worth the sum of $70,599,484.81, renders it not unlikely—it would seem, most likely—that the fair cash value of the 1,644.58 miles of plaintiff's railroad in Kentucky, outside the mileage operated by it on account of the owner and by separate corporations in Kentucky for the year ending June 30, 1912, was as much as that sum. I will therefore dispose of the case on the basis that it was that much.

This is not such an exactness as I always like to attain, but the case is one where exactness is not, and only approximation is, attainable. Taking 60 per cent. of $92,181,766 would give $55,309,059.60 as the value of the portion of plaintiff's unit in Kentucky. Deducting $29,500,566, the assessed value of the tangible property, leaves $25,808,493.60 as the value of the franchise. And deducting from this balance $22,899,300, the amount on which payment has been made, leaves $2,909,192.60 on which payment should yet be made.

A decree will be entered enjoining defendants from enforcing the assessment complained of, and from making and enforcing any other assessment of plaintiff's franchise for the year 1913, on condition that it pays the taxes, state and local, on $2,909,193.60 in addition to what it has paid. But, if either side desires it, the decree may be limited to an injunction against the enforcement of the assessment complained of without prejudice to the making and enforcing of another assessment for that year, to be equalized at 60 per cent., and to be credited with the sum on which payment has been made.

A. M. J. COCHRAN, *Judge.*

Aug. 31, 1915.

244 Said opinion of court filed on September 22, 1913 in same styled case, no. 729 and referred to in preceding opinion is in words and figures as follows, towit:

United States District Court, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,

v.

H. M. BOSWORTH, THOMAS S. RHEA, and C. F. CRECILIUS, Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky; H. M. Bosworth, Auditor of Public Accounts of the State of Kentucky; G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky; James Garnett, Attorney General of the State of Kentucky; C. H. Morris, First Assistant Attorney General of the State of Kentucky; M. M. Logan, Second Assistant Attorney General of the State of Kentucky; O. S. Hogan, Third Assistant Attorney General of the State of Kentucky; Robert B. Franklin, Commonwealth's Attorney for the Franklin Circuit Court of the State of Kentucky; W. C. Marshall, County Attorney of Franklin County, of the State of Kentucky, Defendants.

245 This cause is before me on motion for a preliminary injunction and demurrer to the bill. The plaintiff is a Kentucky corporation and the defendants are citizens and officers of the State of Kentucky. The injunction sought is to restrain the defendants from taking certain action which they threaten to take in relation to an assessment of certain of plaintiff's property for taxation made by the Board of Valuation and Assessment of the State, August 31, 1912, for the year 1912. The defendants Bosworth, Rhea and Crecilius are, respectively, auditor, treasurer and secretary

of state and, as such, constitute the board which made the assessment. The action which they threaten to take is to apportion the assessment to the several counties, cities, towns and taxing districts through which plaintiff's railroad runs in order to the collection of local taxes. This is the only further action which it is within their power to take in relation thereto in such capacity. That which the defendants Bosworth and Likens threaten to take in their capacities as auditor and assistant auditor is to certify such apportionments to the county clerks of the several counties through which plaintiff's railroad runs, a further step essential to the collection of local taxes, to enter in account as a demand payable at the treasury of the state the taxes due the state based on the assessment, to report to the attorney general the delinquency on plaintiff's part arising from a failure to pay those taxes, and to cause proceedings to be instituted against it because of its failure to pay them. And that which the other defendants, to-wit, Garnett, Morris, Logan and Hogan, respectively, attorney general and assistant attorney generals, the defendant Franklin, Commonwealth's attorney for the Frank-
246 lin Circuit Court, and the defendant Marshall, county attorney of Franklin County, threaten to take in such capacities is to institute and prosecute proceedings against plaintiff by indictment and civil action to recover such taxes and penalties because of its delinquency in failure to pay them. All of this action is action to enforce the assessment.

The plaintiff claims that the assessment is void and that therefore, the defendants have no right to take such action and the taking thereof will be a wrong to it. The assessment was made by the board under sections 4077 to 4081, inclusive, and section 4083 of the Kentucky Statutes, the constitutionality of which is unquestioned. The plaintiff's property consists of its railroad, rolling stock, stations, terminal facilities, rights to be and to do and its good will. All of these constitute a physical and organic unit. This unit covers thirteen different states including Kentucky. On a mileage basis a larger part thereof is in Kentucky than in any other state. That which was assessable by the board under these statutory provisions was the part of plaintiff's intangible property located in this state. Those provisions characterize it as its franchise or corporate franchise therein. The judicial phrase therefor is its intangible property so located. In the numerous cases which have arisen under these statutory provisions the phrases corporate franchise and intangible property are treated as synonymous. I will hereafter refer to it as plaintiff's franchise in this state. There provisions have been the law of this state substantially as they now are for over twenty years. The assessment made by the board for the previous year, i. e., 1911, amounted to $11,899,200. The state tax thereon was $59,496 and the local taxes $86,994.41, or the two together $167,644.37.
247 The assessment that year was larger than it had been any previous year. The assessment complained of herein amounts to $45,428,071. The State taxes thereon amounts to $227,140.37 and the local taxes to $332,165.52 or the two together to $559,306.89. By reason thereof, if it stands, the plaintiff

will be compelled to pay $412,816.48 more than it paid the previous year, and it is reasonable to expect that hereafter it will have to pay at least this increased amount each year of its existence. This increase is not due to any change in the value of the plaintiff's intangible property in this state. It is due solely to a change in the judgment of the board as to its value. It should be noted, however, that there has been a change in the constituent members of the board and the one here in issue is the first assessment which has been made by the board as it is now constituted. Mr. Justice Brewer in referring to an increase in the assessment of a railroad's property by an Indiana board in the case of Pittsburg, Etc., R. R. Co. v. Backus, 154 U. S. 418, which he characterized as "a great increase," but which was not as great an increase as here, said that it suggested "that which is unfortunately too common—an effort to cast an unreasonable proportion of the public burden upon corporate property." He added however;

"Still it must be borne in mind, that a mere increase in the assessment does not prove that the last assessment is wrong. Something more is necessary before it can be adjudged that the assessment is illegal and excessive and the question which is to be now considered is whether the testimony shows that the assessment made by the state board can be adjudged illegal."

248 And the Court in that case upheld the assessment.

(1) The plaintiff claims that the assessment is void on two grounds. One is that it violates the 14th Amendment to the Federal Constitution in that it denies it the equal protection of the laws. the other is that the board did not follow the statute. It is because of the former claim that this court has essential jurisdiction of this suit. It would not otherwise have it. This is so because there is no diversity of citizenship between the parties hereto. Plaintiff, however, does not have to make this claim good. It is sufficient if the claim is not colorable, or, in other words, is made in good faith. As to this there can be no doubt.

The plaintiff, therefore, is entitled to the relief it seeks, if it does no more than make good the other claim, to-wit, that the board in making the assessment did not follow the statute. Siler v. L. & N. R. R. Co. 213, U. S. 175.

(2) But before I can consider this claim of plaintiff I must notice and dispose of a preliminary contention put forth by the defendants. It is that this is a suit against the State of Kentucky and forbidden by the Eleventh Amendment to the Federal Constitution and that, therefore, it is not maintainable, even though the assessment complained of is void on both grounds relied on by plaintiff. As heretofore stated the relief sought herein is an injunction against the defendants restraining them from taking certain action which they are threatening to take in the name and for the state under color of their respective offices. What that action is has also already been set forth in detail. Possibly it may be said that, in so far as it relates to the apportionment and certification of the assessment to the subordinate jurisdictions, it is not action for the state.

249 But I will treat it as such. So far as the other action is concerned, which looks to the collection of the state tax on the assessment, there can be no question that it is such. This contention, then, is that a suit in a Federal Court against state officers to enojoin them from taking action which they threaten to take in the name of and for the state, under the color of their offices to enforce an assessment made by a board under a constitutional statute, as the one involved here is, is a suit against the state and so forbidden and hence not maintainable, even though the assessment is void. The plaintiff meets the contention with the cases of Ex parte Young, 209 U. S. 123; W. U. Telegraph Company v. Andrews, 216 U. S. 165. It claims that they are conclusively against it. The defendants, on the other hand, say that, instead of this being so, those cases conclusively support their contention. This radical difference between the parties is not as to the thing decided in these cases. They agree as to what was decided in each. It was decided therein that a suit in a Federal Court against state officials to enjoin them from taking action which they threaten to take in the name of and for the state under color of their offices to enforce an unconstitutional statute is not a suit against the state and so forbidden and that such a suit is maintainable. The kernel of Mr. Justice Peckham's opinion in the Young case is to be found in that portion thereof quoted by Mr. Justice Day in the W. U. Tel. Co. case, which is in these words, to-wit:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the state, are clothed with some duty in regard to the enforcement of
250 the laws of the state, and who threaten and are about to commence proceedings either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of Equity from such action."

Where they differ is as to what follows from this decision. According to defendants it follows therefrom that such suit is maintainable only when the threatened action sought to be restrained is action to enforce an unconstitutional act of the legislature, i. e., an unconstitutional statute. And it is because this suit is not a suit to enjoin threatened action of that character that they claim that these cases support this contention of theirs as to the maintainability of this suit. According to plaintiff it follows therefrom that any suit where the threatened action sought to be enjoined is action to enforce an unconstitutional act of any state officers or officer, whether legislators or not, is maintainable. And it is because this suit is a suit to enjoin threatened action to enforce an unconstitutional act of the Board of Valuation and Assessment, to-wit, the assessment complained of herein, though made under a constitutional statute, that they claim that these cases are against this contention. These two cases are not the only cases in the Supreme Court of the United States where the thing decided therein has been decided as there.

There are quite a number of others. Such are the following, to-wit:

Osborne v. Bank of the United States, 9 Wheat., 738.
Davis v. Gray, 16 Wall., 203.
Board of Liquidation v. McComb, 92 U. S., 531.
Pennoyer v. McConnaughy, 140 U. S., 1.
251 In re Tyler, 149 U. S., 104.
Smyth v. Ames, 169 U. S., 466.
Prout v. Starr, 188 U. S., 537.
Herndon v. Chicago R. I. & P. R. R. Co., 218 U. S., 135.

In each of these eight cases as in each of the other two, it was decided that a suit in a Federal Court against state officers to enjoin them from taking action which they threaten to take in the name of and for the state under color of their offices, to enforce or in pursuance to an unconstitutional statute is maintainable. They, likewise, support or are against defendants' contention according to which of the parties is right as to what follows from such a decision. Here then are ten cases in that Court which decide exactly the same thing and there is a radical difference of opinion as to what follows therefrom. As I view the matter the defendants are wholly wrong and the plaintiff does not claim the whole truth. Defendants' position is wrong because it proceeds on the assumption that those cases cover the whole law on the subject of the maintainability of suits in Federal Courts against state officers to enjoin them from taking action which they threaten to take in their capacities as such and for and on behalf of the state. They do not cover the whole law thereon. On the contrary what is within the principle underlying that which was decided therein is as much the law as what was decided. That the suit is maintainable where the threatened action sought to be enjoined is action to enjoin an unconstitutional act on the part of any state officers or officer, as plaintiff claims, was decided by the Supreme Court in the case of Reagan v. Farmer's Loan & Trust Company, 154 U. S., 362, cited and approved in the Young case. There the
252 threatened action sought to be enjoined was not action to enforce or in pursuance of an unconstitutional statute, but action to enforce transportation rates fixed by the Texas Railroad Commission under a constitutional statute empowering it to fix such rates on the ground that the rates so fixed were confiscatory and hence that the act of the railroad commission—not the statute—was unconstitutional. The suit was held to be maintainable. To the same effect is the case of Prentis v. Atlantic Coast Line R. R. Co., 215 U. S., 210. Plaintiff's position does not cover the whole truth because the principle underlying the decision that the suit is maintainable if the threatened action sought to be enjoined is action to enforce an unconstitutional statute is not limited to suits where the threatened action sought to be enjoined is action to enforce an unconstitutional act on the part of some state officers or officer. It gives that principle a too narrow range. And, if it has no wider scope, then this suit in so far as it is based on the claim that the assessment complained of is void because the Board of Valuation and Assessment did not follow the

statute is not maintainable. If then defendants are wrong as to what follows from what was decided in those ten cases and what plaintiff claims follow therefrom is not the whole truth what is the whole truth that follows therefrom? An ascertainment of this will help us to correctly dispose of this contention of defendants. It is to be found in the principle underlying what was decided therein. What then is that principle? What was the ratio decidendi of what was decided therein? Why was it decided therein that the suit is maintainable if the threatened action sought to be enjoined is action to enforce or in pursuance to an unconstitutional statute? It
253 was so decided because the sole basis of the action sought to be enjoined was the unconstitutional statute and this being so, the state officers sued had no right to take it and the taking thereof would be a wrong to the plaintiff. In other words it was so decided because the action which the defendants were threatening to take would, if taken, be a wrong to the plaintiff or what they were sought to be enjoined from doing was the commission of a threatened wrong to plaintiff.

The threatened action sought to be enjoined in the Bank of the United States and the Tyler cases was the seizure of the plaintiff's property in payment of a tax. The statute imposing the tax was unconstitutional. This being so the defendants had no right to take the action and the taking thereof would be a wrong to the plaintiff. It would deprive it of its property without right. One who deprives another of his property without right commits a wrong against him. That sought to be enjoined in the McCombs case was the delivery of a portion of a certain issue of state bonds in breach of contract of the state with plaintiffs, holders of the other portion thereof. It was authorized by a statute which was unconstitutional as impairing the obligation of that contract. This being so the defendants had no right to take the action and the taking thereof would be a wrong to plaintiffs. It would depreciate the value of the bonds which they held and hence would in this way deprive them of their property. That sought to be enjoined in the Gray and McConnaughy cases was the issue of land grants in the name of the state covering land previously granted to plaintiff. The issuance thereof was to be pursuant to a statute which was unconstitutional as impairing the obligation of the contract contained in the previous grant to the plaintiff.
254 The statute being unconstitutional the defendants had no right to take the action and the taking thereof would be a wrong to plaintiff. It would cast a cloud on the title to the land covered by his grant and thereby deprive him of his property. That in the Ames, Starr, Young, W. U. Tel. Co. and Chicago, R. I. & P. R. Co. cases was the institution and prosecution of suits and other proceedings against the plaintiff for failure to comply with a certain statute. This statute was unconstitutional and hence the plaintiff was not liable to be so proceeded against, for such failure. This being so the defendants had no right to institute and prosecute the suits and other proceedings and because of the multiplicity thereof the institution and prosecution thereof would be a wrong to plaintiff. In defending same it would be deprived of its property. It is possible

for one to wrong another by instituting and prosecuting a suit or other proceeding against him. If he so does with malice and without probable cause he can be made to respond in damages at law. If he institutes and prosecutes a multiplicity of suits, all involving the same question, and groundless he also commits a wrong; and it is such as equity will enjoin. It was such a wrong as this, i. e. the institution and prosecution of a multiplicity of groundless suits, all involving the same question, that was sought to be enjoined in these five cases and because thereof the suits were held maintainable. The suits and other proceedings enjoined were groundless because they were to enforce an unconstitutional statute, i. e. to recover penalties for failure to comply therewith. To no other extent did the unconstitutionality of the statute affect the maintainability of the suits.

255 Such then being the reason why it was decided in these ten cases that the suit was maintainable it follows therefrom that any suit is maintainable in a Federal Court against state officers to enjoin them from taking any action which they threaten to take if they have no right to take such action and the taking thereof will be a wrong to the plaintiff. It is not essential that the action be to enforce or in pursuance of an unconstitutional statute. Nor is it essential that it be action to enforce or in pursuance to an unconstitutional act on the part of some state officers or officer. It is sufficient that they have no right to take the action and that the taking thereof will be a wrong to the plaintiff. But the wrong must be such as equity will enjoin. It is not otherwise material what may be the character of the action. Such then I take to be the whole truth as to what follows from what was decided in those ten cases. The same principle which underlay what was decided therein underlies what was decided in the Farmer's Loan & Trust Co., and Atlantic Coast Line Co. cases and the same result follows therefrom. The threatened action sought to be enjoined therein was the institution and prosecution of suits and other proceedings for failure to comply with the act of a railroad commission under a constitutional statute, which was unconstitutional because confiscatory, and thereby to enforce such act. The act of the railroad commission being unconstitutional, the plaintiff was not liable to such suits and proceedings, the defendants had no right to institute and prosecute them, and the institution and prosecution thereof would be a wrong to plaintiff and that such as equity will enjoin. It was on this ground that the suits were held main-

256 tainable. Here then are twelve cases in the Supreme Court from the decisions in which it follows that a suit is maintainable in a Federal Court against state officers to enjoin them from committing a threatened wrong to the plaintiff if the wrong is such as equity will enjoin. That in order to the maintainability of the suit there is no other essential characteristic of the threatened wrong than that it be such as equity will enjoin is made certain by the following cases in that Court, to-wit:

Allen v. Baltimore & Ohio Railroad Company, 114 U. S. 311.
Scully v. Bird, 209 U. S. 481.
Philadelphia Co. v. Stimson, 223 U. S. 605,

in each of which, except the Philadelphia Company case a suit in a Federal Court against state officers to enjoin action which they threatened to take in the name and for the state and under color of their offices was held maintainable. In the Philadelphia Company case the suit was not against state officers but against United States officers. Though the Eleventh Amendment could not apply to such a case the common law rule that a sovereign is not suable could and this raised the same question as to the maintainability of the suit. It was held to be maintainable. The threatened wrong sought to be enjoined in the Baltimore & Ohio Railroad Company case was the seizure of the rolling stock, etc., of a railroad to collect a valid tax after a tender of tax receivable coupons in payment thereof. The threatened wrong sought to be enjoined in the Scully case was the taking of certain action by a dairy and food commissioner under cover of his office but alleged to be a violation of the state laws, which if taken would injuriously affect the reputation and sale of certain products manufactured by plaintiff. And the threatened
257 wrong sought to be enjoined in the Philadelphia Company case was the institution and prosecution of criminal proceedings against the plaintiff because of its reclamation and occupation of its lines within certain harbor lines in the harbor of Pittsburgh, Pennsylvania. It is to be noted as to this case that an injunction against such proceedings was not the only relief sought therein. It was also sought to have the harbor lines which had been established by the secretary of war set aside. In so far no doubt the suit was not maintainable. But no notice seems to have been taken of this. The fact is that a suit in a Federal Court against state officers to enjoin them from committing a threatened wrong in the name and for the state and under color of their offices depends as to its maintainability on no more than what is essential to the maintainability of a suit against them to enjoin them from committing a threatened wrong in their individual capacities. In such a suit it is essential that the wrong be such as equity will enjoin. This and nothing more is required. That they are threatening to commit the wrong in the name and for the state under color of their offices without any personal interest in the matter is of no significance whatever.

The conclusion thus reached as to the maintainability of suits against state officers in a Federal Court to enjoin them from taking action which they so threaten to take has been reached from a consideration of the cases in the Supreme Court involving such action. The same conclusion follows from a consideration of two other classes of cases in the Supreme Court—those involving past action on the part of state officers in the name and for the state and under color of their offices, and those involving present action of

258 this character. Cases belonging to the first of these two classes are the following, to-wit:

Mitchell v. Harmony, 13 How. 115.
Bates v. Clark, 95 U. S. 234.
White v. Greenhow, 114 U. S. 307.
Chaffin v. Taylor, 114 U. S. 310.
Belknap v. Schild, 161 U. S. 10.
Scott v. Donald, 165 U. S. 58.
Hopkins v. Clemson Agricultural College, 221 U. S. 636.

In each one of these cases, except the Hopkins case, the suit was against an officer or officers, state or federal, to recover damages for action which they had so taken. The action taken had been taken in the name and for the state and under color of their offices, believing in good faith that they had the right to take it. They had no personal interest in the matter whatever. But in each case also they had no right to take the action and the taking of same was a wrong to plaintiff. The Hopkins case was not a suit against state officers, but against a private corporation, which may be said to have been a state agent, which had acted in its own name, but under authority of the state and possibly may be said to have acted on its own behalf. The suit was held maintainable in each case. In the Clark case Mr. Justice Miller said that one cannot protect himself "by orders emanating from a source which is itself without authority." In the Schild case the claim for damages was asserted in a suit for an injunction against threatened action and the decision was that it should have been asserted at law.

259 Cases belonging to the other class are the following, to-wit:

United States v. Lee, 106 U. S. 196.
Poindexter v. Greenhow, 114 U. S. 270.
Tindal v. Wesley, 167 U. S. 204.

In each of these cases present action on the part of the officer or officers sued was complained of. It consisted of withholding from plaintiff the possession of property to which he was entitled and the withholding of which was a wrong to him. In the Lee and Wesley cases the property withheld was real estate and in the Poindexter case personal estate. The withholding was in the name and for the state and under color of their offices in the belief in good faith that they had a right to withhold it. They had no personal interest in the matter whatever. The suit was to recover possession of the property withheld. In each case it was held that the suit was maintainable. The Bank of the United States case, heretofore placed in the class having to do with threatened wrongs, also belongs here, in so far as the amended bill against the state treasurer to compel him to restore to the plaintiff the $100,000 in money which the auditor's appointee had, after the preliminary injunction was granted against him, on the original bill, forcibly taken from it and turned over to the treasurer, but which the latter had not mingled with the state's funds, was concerned, which was held maintainable.

Now here are three classes of cases exactly alike in certain particulars. In each class the action complained of is action on the part of the officers sued in the name and for the state and under color of their offices in the belief that they had or have the right to
260 take it and without any personal interest in the matter whatever. And in each class that action was a wrong against the plaintiff of which he had a right to complain. They differed only in this that in one class of cases the action was threatened—in the other past and over—and in the other then on hand. There is nothing whatever in this difference that could have any bearing on the question of the maintainability of the suit in relation thereto except that, as the relief against the threatened action sought in the first class of cases, could only be obtained in equity, the action had to be such as equity will enjoin. It is, therefore, a legitimate inference from the maintainability of suits having to do with past and present wrongs that suits having to do with threatened wrongs are maintainable if the wrongs complained of are such as equity will enjoin. They are no more suits against the state and forbidden by the Eleventh Amendment than are suits which have to do with past or present wrongs.

Thus far I have limited myself to cases in the Supreme Court in which suits in a Federal Court against state officers have been held maintainable and have gathered from them that such a suit is maintainable to enjoin them from taking action which they threaten to take in the name and for the state and under color of their offices if they have no right to take the action and the taking thereof will be a wrong to plaintiff such as equity will enjoin. There are a number of cases in which suits in a Federal Court against state officers have been held not to be maintainable. It should be considered whether these cases or any of them are against this conclusion.

Such are the following cases, to-wit:

Louisiana v. Jumel, 107 U. S. 711.
261 Cunningham v. Macon, Etc., R. R. Co., 109 U. S. 446.
Hagood v. Southern, 117 U. S. 52.
In re Ayers, 123 U. S. 443.
Christian v. Atlanta & N. C. R. R. Co., 133 U. S. 233.
Belknap v. Schild, 161 U. S. 10.
Fitts v. McGhee, 172 U. S. 516.
Smith v. Reeve, 178 U. S. 436.
International Postal Supply Co. v. Bruce, 194 U. S. 601.

I have heretofore considered the Schild case, in so far as it had to do with the right to recover damages for a past wrong. It is classed here so far as it had to do with the right to enjoin a future or threatened wrong. The decisions in these cases that the suits were not maintainable do not conflict with the cases heretofore considered and they are not against the conclusion which I have gathered therefrom, except the Schild and possibly the Postal Supply Company cases. As I read the Schild case the relief sought other than for damages was against the continued use of the patented caisson gate, for the past use of which the damages were claimed, and the destruction

thereof. In so far as the relief sought included the destruction of the gate undoubtedly plaintiff was not entitled to it. The gate had been made by the Union Iron Works of San Francisco and then put in place and continued to be used by the defendants acting on behalf of the United States. Though the making and use of the gate was an infringement of the patent and, therefore, wrongful, the title to the gate was in the United States. It owned the gate and was entitled to its possession, subject to the right of destruction which plaintiff had. It had this right in order to prevent its use in derogation of the patent. It, however, was a right which plaintiff
262 could not assert in a suit against the United States, because it was not suable; and it was not a right which could be asserted against the officers sued in that case because they had no interest in the matter whatever and the decreeing of destruction of the gate would not be the granting of relief as against them, the only relief which could be granted. But I am unable to see why the plaintiff was not entitled to the injunction against the continued use of the gate by the officers sued. The use thereof was a wrong to plaintiff for which in the past it was held they were liable in damages. The case so far seems to be based on the English case of Vavasseur v. Krupp, L. R. 9 Ch. Div. 351. It was there held by the Chancery Court of England that a suit was not maintainable by an English patentee against the agents of a foreign sovereign stationed in England and in possession of shells, the making and use of which was an infringement of the patent, to enjoin the agents from delivering them to the sovereign. But a delivery of the shells to the sovereign was not a use of them in violation of the patent. The foreign sovereign owned the shells and was entitled to their possession. The patentee's sole right was to have the shells destroyed. But that was a right which could not be asserted in a suit against the agents. This case supports the decision in the Schild case in so far as it held that the plaintiff was not entitled to a destruction of the gate. It does not support it in so far as it was held that the officers sued were not enjoined from further using the gate. The Postal Supply Company case was based on the decision in the Schild case. Mr. Justice Holmes approved the holding therein that a patentee is not entitled to an injunction against the officers of the United States, en-
263 joining them from using an article infringing a patent. In referring to the Schild case he said:

"It was pointed out that the defendants had no personal interest in the continuance of the use, and that so far as the injunction was concerned the suit was really against the United States. Of course, if those defendants were enjoined other persons attempting to use the caisson gate would be and thus the injunction would practically work a prohibition against its use by the United States."

But this is what happened in all cases above referred to in which suits have been held maintainable against the officers of a state enjoining them from acting on behalf of the state. The injunctions granted in effect prevented the state from so acting, or rather its officers from so acting on its behalf. The Postal Supply Company

case, however, apart from this feature of it, would seem to have been decided right. It appeared that the Syracuse postmaster who was sued had himself never used the cancelling and postmarking machine. It had only been used by two subordinates in the office. Of course, if any one was to be enjoined it should have been those guilty of using it and not the postmaster.

In none of the other cases had the state officials sued either committed any wrong against the plaintiff-, or were they then committing any wrong against them or were they threatening to commit any wrong against them. In the Cunningham and Christian cases no relief even was sought against the state officers sued. In each case the suit was to subject property, the title to which was in the state, to the payment of an indebtedness on its part. In the Cunningham case the property was the railroad which the state of
Georgia had purchased under the first mortgage and the
264 title to which it had acquired, and it was sought to be subjected to the payment of second mortgage bonds endorsed by the state. In the Christian case the property was stock in a certain railroad and dividends thereon owned by the state and in the possession of the state treasurer and they were sought to be subjected to payment of the bonds of the state to whose payment they had been pledged. Such relief was not relief against the governor and treasurer of the state, defendants in the one case, or against the treasurer of the state, defendant in the other case, but in each case the relief sought was against the state whose officers or officer alone had been sued.

In the Jumel, Southern and Smith cases, though relief was sought against the state officers sued, it was not to make compensation for a past wrong or to cease withholding property owned by plaintiff and which they were withholding from him, or to enjoin them from committing a threatened wrong. It was to compel the state officers to do something which the plaintiffs had no right to have them do, i. e. to take funds of the state over which they had more or less control and pay the state's debts with them. There was no statute in force imposing the duty on the state officers sued of doing that which it was sought to compel them to do. The relief sought was to compel the state whose officers were sued to pay their debts by acting on those officers.

The Ayers and McGhee cases, of all these cases where it was rightly held that the suits were not maintainable, are probably the most
difficult to distinguish from those where it has been held
265 that the suit was maintainable. The Ayers case is the one of a number of cases in the Supreme Court of the United States known as the Virginia Coupon cases. The state of Virginia had issued bonds containing a provision that the bonds and coupons should be receivable in payment of taxes due it. The state desired to repudiate the bonds and in order to understand the Ayers case a brief resume of the means resorted to by the legislature of the state to embarrass and prevent the use of the coupons cut from these bonds in payment of taxes will be helpful. The first step was an enactment that only gold or silver coin or United States Treasury

or National Bank notes should be receivable in payment thereof. This act was held unconstitutional by the Supreme Court of Virginia. The legislature then enacted that the bonds should be subject to a certain tax and the tax collectors should deduct this tax from the coupons when tendered and credit only the balance of the coupons on the taxes. This was overthrown by the Supreme Court of the United States in the case of Hartman v. Greenhow, 102 U. S. 672. The suits in which the legislation down to this last act had been invalidated were suits in mandamus and by them notwithstanding such legislation the tax collectors were compelled to accept the coupons in payment of taxes. The legislature then directed its attention to suits in mandamus in such cases. It provided for troublesome proceedings for the establishment of the genuineness of the coupons before the writ could issue. This legislation was upheld by the Supreme Court of the United States in the case of Antoni v. Greenhow, 107 U. S. 769. The result was that the tax payer- quit resorting to mandamus proceedings. They tendered their coupons and then rested on their oars. This
266 forced the tax collectors to take action, for the state wanted its taxes. Suits could not be brought to collect them, for there was no legislation authorizing suits and there had to be such legislation in order that suits might be brought. The only action which they could take was to distrain and levy for taxes and this they did. Thereupon arise the White and Chaffin cases, hereinbefore cited, which were suits in trespass by tax payers against the tax collectors to recover damages and the Poindexter case, hereinbefore cited, which was a suit by a tax payer against the tax collector to recover the property levied on, which suits were held maintainable as heretofore shown. It was evidently these decisions which brought about the legislation out of which arose the Ayers case. That legislation authorized suits to be brought for the recovery of taxes in the name of the state and provided further that if the defendant relied on a tender of coupons as payment of the taxes the burden should be on him to prove both the tender and the genuineness of the bonds. This legislation was valid. No fault was or could have been found with it. The collection of taxes by suit may be authorized and the tax payers had no right to tender in payment of their taxes coupons unless they were genuine. There had been, however, previous legislation providing that in suits where the tender of coupons was involved the tax payer should produce the original bonds from which they were cut and that expert evidence as to genuineness was not admissible and the claim on behalf of the state was that this legislation applied to suits for the collection of taxes authorized by this subsequent legislation. Thereupon a suit was brought in the United States Circuit Court for Virginia against the attorney general of that state and certain other officers
267 charged with the bringing of such suits to enjoin them from so doing on the ground that the previous legislation practically cut off the defense that genuine coupons had been tendered and hence impaired the obligation of the contract under which they had been issued and accepted. That Court having granted

a restraining order and confined the attorney general for disobeying it, the matter was brought before the Supreme Court by writ of habeas corpus. It held that the lower Court had no right to make the restraining order and released the attorney general. It is to be noted that the suit had been brought not by any tax payer, but by an Englishman who had bought up the coupons on a speculation and sold them to taxpayers. He, therefore, had no direct interest in the matter of enjoining the bringing of the suits against the taxpayer. His interest was consequential solely—the effect that the right to bring such suits and to hamper the defense to them would have upon the coupons which he still had. He had no right to bring the suit as had been held in the previous case of Marye v. Parsons, 114 U. S., 325, but, this apart, the attorney general and other prosecuting officers had the right to bring the suits the bringing of which was sought to be enjoined. The statute authorized it and was valid. The tender of the coupons was a good defense only in case the coupons tendered were genuine and the state had the right to litigate that matter. The question of the application of the previous legislation as to the production of the bonds from which the coupons had been cut and exclusion of expert evidence and the validity thereof could come up in these suits and there be disposed of. The suits, therefore, which the officers were sought to be enjoined from bringing were not groundless suits, but suits
268 which they had a right to bring. In bringing them no wrong would be done the tax payer. The threatened action which was sought to be enjoined would not, if taken, be a wrong to the plaintiff. Besides each taxpayer was threatened with but a single suit. Hence it was properly held that suit against the state officers was not maintainable. The ground of the decision, therefore, was not that the suit was against the state, but because the state officers were not about to do that which would be a wrong to the plaintiff.

In the McGhee case the legislature of Alabama had passed an act fixing maximum rates of toll for passage over a certain bridge and provided a penalty for any charge in excess thereof, recoverable by the person overcharged. No other than the person overcharged had any right to sue for the penalty. There was a general statute making it an offense for any bridge company, or any of its officers or agents, to charge tolls in excess of those authorized by its charter, or if the charter did not specify the amounts to be charged, in excess of a reasonable toll, and prescribing a fine for so doing. Prosecutions under this statute were by indictment in the name of the state. After the passage of the special act, a large number of indictments—one hundred or more—were found against the bridge company's toll-gate keeper. They were and could only have been found under the general statute. The suit as originally brought was against the state of Alabama, the governor and attorney general thereof as such, they being called on to answer on behalf of the state, and the state's attorney for the county wherein the indictments were found. The bill claimed that the special act was unconstitutional in that the rates fixed thereby were confiscatory. Subsequently the case was

269 dismissed as to the state and the call on the governor to answer on behalf of the state was stricken out. Pending the suit, a preliminary injunction was granted against the attorney general restraining him from instituting proceedings in mandamus to compel the bridge company to charge tolls in accordance with the special act or forfeiting its charter for charging in excess thereof and also one against the state's attorney restraining the prosecution of the indictments. The final decree adjudged the special act unconstitutional and made the preliminary injunctions perpetual. The decree was reversed and the lower court directed to dismiss the bill. The sole ground upon which it was held that the plaintiff was not entitled to a decree against the state's attorney having in charge the prosecution of the indictments enjoining him from prosecuting them was that they were criminal proceedings. This much of the holding was not placed on the ground that, in so far, the suit was one against the state of Alabama. It might also have been placed on the ground that the state's attorney had the right to prosecute those indictments. The statute under which they had been found was not and was not claimed to be unconstitutional. What he was about to do, therefore, was not a wrong to the plaintiff. The ground upon which it was held that plaintiff was not entitled to any relief as to the attorney general does not so clearly appear. The confusion, if such there is, grows out of the uncertainty as to what relief other than an injunction restraining the prosecution of the indictments the bill was construed as seeking. There is room to think that all the other relief which the bill was construed as seeking was an adjudication that the special act was unconstitutional. Of
270 course, if such was the case, no relief whatever was sought against the attorney general; and as was said by Mr. Justice Peckham in the Young case:

"A state superintendent of schools might as well have been made a party."

It is possible, however, that it was construed as seeking an injunction against the attorney general in the matter of suits to recover penalties for excess charges of tolls under the special act and further restraining him from instituting a proceeding in mandamus to compel obedience to the act or one forfeiting its charter for disobedience thereof. If it was construed as seeking an injunction against him in the matter of suits to recover the penalties, the ground upon which it was held, that the suit, in so far, was not maintainable undoubtedly was that the attorney general had and could have no connection with the bringing of those suits. The penalties were recoverable only by the persons overcharged. That the bill should have been construed as seeking an injunction against the attorney general restraining him from instituting mandamus or forfeiture proceedings cannot be questioned for the bill expressly prayed therefor, and one of the preliminary injunctions made perpetual by the decree was to that effect. The doubt as to whether the bill was construed as seeking such an injunction is due to the fact that no mention of this feature of the bill is made in Mr. Justice Harlan's opinion. If it was so construed the ground upon

which it was held that the plaintiff was not entitled to such relief must have been that such a proceeding was a single proceeding which the plaintiff had no equity to prevent being instituted. Though groundless it was not an equitable wrong to plaintiff for the attorney general to bring it and hence not enjoinable. There
271 is nothing in the Young case against this holding in this particular being sound. For though in that case the attorney general disclaimed any intention to institute any proceedings besides the mandamus proceedings, it was possible for him to subject the plaintiff to a multiplicity of suits and he had no right to expect plaintiff to rely on his intentions. In the McGhee case it was not possible for the attorney general to institute any proceeding but the single proceeding in mandamus or forfeiture. There is, therefore, nothing in the Ayers and McGhee cases in conflict with the cases involving suits against state officers having to do with past, present or threatened action on their part constituting a wrong to plaintiff. Possibly there are expressions in the opinions therein which it may be difficult to harmonize with those cases. But in so far as those expressions are in conflict therewith they will have to be ignored.

A consideration, therefore, of all the cases in the Supreme Court of the United States in which the question as to the maintainability of a suit in a Federal Court against officers of a state has arisen—in many of which the suit has been held maintainable and in others of which it has been held not maintainable—leaves no room for doubt as to the maintainability of such a suit where the relief sought is against a threatened wrong such as equity will enjoin just as much so as where it is based on a past or present wrong. The whole matter is well put by Mr. Justice Lamar in the Hopkins case. He there said:

"But immunity from suit is a high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amend-
272 ment was not intended to afford them freedom from liability in any case, where under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law."

Again he said:

"The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers."

And again he said:

"Neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application—the wrong doer—is treated as a principal and individually liable for damages inflicted and subject to injunction against the commission of the act causing irreparable injury."

And in this connection it is to be distinctly noted that the maintainability of the suit in such a case to no extent depends upon

whether the state will be affected by its maintenance. In all the cases where complaint was made of a threatened wrong and in which it was held that the suit was maintainable it was so held notwithstanding the state was so affected by the granting of the relief sought that no action at all, in such particular, could be taken on its behalf. The state was also seriously affected in the suits where complaint was made of the present wrong of withholding property from plaintiff and in which the suit was held maintainable. Its officers were deprived of the possession of the property which they held for
273 it. It was only in the cases where complaint was made of a past wrong that the state was not affected by the maintainability of the suit. It was not otherwise affected than that thereby other state officers would be deterred from committing like wrongs in its behalf. In order then for a suit in a Federal Court against state officers seeking relief against threatened wrong not to be maintainable it is not sufficient that the state be affected thereby, no matter to how great extent.

But though, as I think, there cannot be the slightest doubt that a suit is maintainable in a Federal Court against a state officer seeking relief against a threatened wrong such as equity will enjoin, notwithstanding all action in that particular on behalf of the state will thereby be prevented and the state to this extent will be affected by the maintenance of the suit, for many years great uncertainty has existed as to the maintainability of such a suit. To a certain extent this uncertainty has been removed by the Young and subsequent cases and yet it has not been entirely removed. The positions of the parties hereto is evidence of this. The defendants with much earnestness and sincerity of conviction contend that this suit is not maintainable. The plaintiff has too narrow an idea as to the maintainability of such a suit. Had it the true view it would not have appended to the names of the defendants in the caption of its bill the title of the offices held by them respectively, which I treat as mere descript personarum. According to the true view of the matter no reference should have been made in the caption to their official capacities thereby giving room for the impression that they are sued in such capacities. They are not so sued. They are sued in their individual capacities to enjoin them from committing a threatened wrong
274 under cover of their official capacities. Other striking evidence of this may be noted in the Young case. Mr. Justice Peckham said:

"It cannot be stated that the case before us is entirely free from any possible doubt nor that intelligent men may not differ as to the correct answer to the question we are called upon to decide."

But it seems to me that a correct generalization of the previous relevant cases in the Supreme Court rendered the case then before the Supreme Court entirely free from doubt and left no room for intelligent men to differ as to the question it was then called upon to decide. The effort was made in that case to settle the law on the subject for all time to come and yet the Supreme Court has had the subject before it since in five cases, to-wit; the Scully, the Atlantic Coast Line Company, the W. U. Telegraph Company, the Chicago, R. I. &

P. R. Co., and the Philadelphia Company cases, and in the last case it deemed it proper to make another survey of the previous relevant cases. It has even found it necessary since then to review all the previous relevant cases in a case where the wrong with which the suit had to do was a past wrong, to-wit; in the Hopkins case, where there would seem to be very little room for difference of opinion. The course of Mr. Justice Harlan in reference to the matter indicates considerable confusion of thought in regard to the matter. Prior to the McGhee case he had been a radical in favor of the maintainability of suits against state officers. He had dissented from the decisions in the Jumel, Cunningham, Southern, Ayers and Schild cases, i. e., in all the cases prior to the McGhee case where it
275 had been held that the suit was not maintainable except the Christian case. As I view it his dissent was sound in the Schild case but unsound in the others. In the McGhee case he said in his opinion on behalf of the Court that the matter had "so frequently been the subject of consideration by the Court" that "nothing of importance" remained "to be suggested on either side of the question" and that it was only necessary in each case as it arose "to ascertain whether it falls on one side or the other of the line marked out" in the former decisions. Yet nothing has done more to unsettle what had been settled before and to create confusion in regard to the matter than the way he handled that case and certain expressions in his opinion therein. Thereafter, he became a radical against the maintainability of such suits. In his dissent in the Young case he claimed that his position was in substantial accord with what the Court had theretofore decided—that the opinion of the majority "departed from principles previously announced by it upon full consideration"—and that he proposed "to adhere to former decisions of the Court whatever may have been once" his opinion "as to certain aspects of this general question." An indication of the confusion of thought under which he was laboring is to be found in the position that he took as to what followed from the decision therein that the suit was maintainable. He said that it followed therefrom that a suit against a state grand jury, a state judge and a state petit jury to enjoin them from having to do with the proceedings that Young, the attorney general, had been enjoined from instituting and prosecuting would be maintainable. But that did not follow. The state judge and juries in trying and disposing of the proceedings would commit
276 no wrong against the plaintiff, whereas Young, the attorney general, in instituting and prosecuting them would. He would thereby subject the plaintiff to a multiplicity of groundless suits all involving the same question. That Mr. Justice Harlan went to his grave thinking that his dissent in the Young case was sound is evident from his dissent in the Hopkins case; the last case before the Court prior to his death involving the question as to the maintainability of suits against state officers or a state agent in any form.

This condition of things has led me to reflect on the probable cause of this uncertainty and confusion of thought. It occurs to me that there are two main sources thereof. One thing that has had

much to do with it is a departure from one of the positions Mr. Chief Justice Marshall took as to the maintainability of a suit in the Federal Court where the sole defendants to the record were state officers, in his well considered opinion in the bank of the United States case, the pioneer case on the subject. That position was that in no contingency was such a suit against the state and forbidden by the Eleventh Amendment. This was so because the state not being a party to the record was not sued. He said:

"It may, we think, be laid down as a rule which admits of no exception that, in all cases where the jurisdiction depends on the party it is the party named in the record. Consequently the Eleventh Amendment, which restrains the jurisdiction granted by the constitution over suits against states, is of necessity limited to those suits in which a state is a party on the record. The amendment has its full effect if the constitution be construed as it would have been construed had the jurisdiction of the Court never been extended to suits brought against a state by citizens of another state or aliens."

277 Mr. Justice Swayne took the same position in the case of Davis v. Gray, supra. He said:

"In deciding who are parties to the suit the Court will not look beyond the record. Making a state officer a party does not make the state a party, although the law may have prompted his action and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation."

The departure from this position was taken by Mr. Justice Matthews in the Poindexter case. He said:

"The question whether a suit is within the prohibition of the Eleventh Amendment is not alone determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention and not to be evaded by technical and trivial subtleties."

He put the matter stronger in the Ayers case. He said:

"It must be regarded as the settled doctrine of this Court, established by its recent decisions, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record."

And further:

"This, it is true, is not in harmony with what was said by Chief Justice Marshall in Osborne v. Bank of United States."

He was led to this departure by the decision in the case of New Hampshire v. Louisiana, 108 U. S. 76, where it was held that the Supreme Court had no jurisdiction by virtue of the third ar-

278 ticle of the constitution conferring jurisdiction upon it of controversies between two or more states of a suit by one state against another to collect an indebtedness of the latter to a citizen of the former assigned to *if* for the purpose of collection. The decision, however, in that case was not because the suit was not a suit between the two states, but was in fact a suit between the assignor of the in-

debtedness and the defendant state, but because a party plaintiff to a suit has no right to enforce the cause of action of another against the defendant thereto. He can only enforce his own cause of action. Mr. Chief Justice Waite said:

"One state cannot create a controversy with another within the meaning of that term as used in the judicial clauses of the constitution by assuming the prosecution of debts owed by the other state to its own citizens."

Mr. Justice Matthews in thus departing from this position of Mr. Chief Justice Marshall seems to have thought that it was essential to do so in order that a suit in which relief was sought against the state might not be rendered maintainable by the trick of not making the state a party defendant to the record. But such a suit could not thereby be made maintainable, for though the Eleventh Amendment or the common law rule against suability of a sovereign would not be against its maintenance, the rule that a suit is not maintainable in the absence of indispensable parties would. And in such a case the state would be an indispensable party. So it was that Mr. Chief Justice Marshall supplemented his position that the Eleventh Amendment did not apply if the state was not a defendant to the record by the further position that when the state was not such defendant and the suit was against state officers only the test
279 of the maintainability of the suit was whether the state was an indispensable party to the suit. He said:

"The state not being a party on record and the Court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether in the exercise of its jurisdiction the Court ought to make a decree against the defendants—whether they are to be considered as having a real interest, or as being only nominal parties."

That the indispensableness of the state as a party is the test of the maintainability of a suit against its officers was recognized by Mr. Justice Miller in the Cunningham case. He said:

"Whenever it can be clearly seen that the state is an indispensable party to enable the Court, according to the rules which govern its procedure, to grant the relief sought it will refuse to take jurisdiction."

Judge Marshall took care to point out that it was the fact that the state was an indispensable party to the suit which alone would render it not maintainable. It was not sufficient that the state was a proper party to the suit. The absence of a proper party to the suit, if for any reason he cannot be made such, as for instance, he is out of the jurisdiction or if it is a state, and cannot be sued, is not in the way of the maintenance of a suit. This principle has found expression in the old 47th Equity Rule. In the Bank of United States case he said:

"The direct interest of the state in the suit as brought is admitted; and had it been in the power of the bank to make it a party perhaps no decree ought to have been pronounced in the cause until the state was before the court. But this was not in the power of the bank."
280 This was a clear recognition, as was the decision in that

case, that the fact that a state will be affected by a suit against state officers is not a consideration against the maintainability of the suit. The result of the decision therein prevented from collection on behalf of the state of Ohio the tax which its officers tried to collect from the bank and from thereby driving the bank out of the state, which was the motive behind the enactment of the unconstitutional statute imposing the tax.

But it seems to me that the better test as to the maintainability of a suit in a Federal Court against state officers is to be found in a consideration of the relief sought therein. If the relief sought is relief against the state it is not maintainable. Such relief may be the only relief sought as in the Cunningham and Christian cases, or it may be sought through relief against the officers as in the Jumel, Southern and Smith cases. If, however, the sole relief sought is relief against the state officers, it is maintainable. Such it is if it seeks compensation for a past wrong, recovery of possession of property wrongfully withheld, constituting a present wrong, or an injunction against a threatened wrong such as equity will enjoin.

This is the better test because it is the test of whether the state is an indispensable party. It is the ultimate test and it is always best to think in ultimates.

The way in which this departure from Mr. Chief Justice Marshall's position that a state was not sued within the Eleventh Amendment unless it was a defendant to the record has contributed to the uncertainty and confusion of thought to which I have alluded is that

the position that the state can be said to be sued when not a
281 defendant to the record within the Eleventh Amendment

has lent color to the idea that in order for it to be so said it is sufficient that the state will be affected by the maintenance of the suit and not essential that the relief therein sought be against it, which we have seen is not true. And the matter has been helped along by the fact that in taking this position the Supreme Court has not made it clear that in order for a suit to be against the state when not a party defendant to the record, it is essential that the relief therein sought be against it, and that it is not sufficient that the state may be merely affected by its maintenance. As it has now to be accepted that a suit may be a suit against a state though it is not a party defendant to the record, it should be clearly understood that in order to this end the one thing is essential and the other not sufficient.

The other source of uncertainty and confusion of thought to which I have referred is the fact that most of the cases in the Supreme Court involving suits in a Federal Court to enjoin state officers from taking action which they threaten to take have been suits where the threatened action sought to be enjoined was action to enforce an unconstitutional statute and in stating the law as to the maintainability of such suits in the opinions therein it has been given a partial cast. Take for instance, the quotation from the opinion of Mr. Justice Peckham in the Young case heretofore made which is taken as the kernel of his opinion therein. In this quotation he undertakes to state the law to be gathered from the various cases in the Supreme Court considered by him. He states that it is to the effect that a suit

to enjoin proceeding to enforce an unconstitutional act violat-
282 ing the Federal Constitution is maintainable. The parties hereto take it that by "unconstitutional act" he meant an unconstitutional statute. But it is by no means certain that he intended to so limit those words. He may have intended to include an unconstitutional act on the part of any state officer. Whichever he meant, as we have seen, the statement was only a partial statement of the law. The law is that a suit to enjoin the commission of any threatened wrong is maintainable. It is because proceedings to enforce an unconstitutional act are a threatened wrong and a suit to enjoin such proceedings is a suit to enjoin the commission of a threatened wrong that such a suit is maintainable. It follows from this that a suit to enjoin any threatened wrong no matter what may be its character, provided that it is such as equity will enjoin, is maintainable. For some reason the law was not put in this general and ultimate form. Quotations from other opinions in this partial form might be made. So stating the law was calculated to mislead, especially one whose thinking may be superficial, into supposing that such is the whole law on the subject of the maintainability of suits to enjoin threatened action.

Applying the law on the subject, as I have felt constrained to hold it to be, how then is it as to the maintainability of this suit? Is the relief sought relief against the state of Kentucky and is the state an indispensable party to the suit? If not, and the relief sought is relief against the state officers sued will the threatened action sought to be enjoined, if taken, be a wrong to plaintiff, and such a wrong as equity will enjoin? It is clear that no relief is sought against the state of Kentucky. The sole relief sought is against the state officers sued. They are sought to be enjoined from taking certain
283 action which they threaten to take. It is certain also that if the assessment complained of is void on either ground relied on that the threatened action sought to be enjoined, if taken, will be a wrong to the plaintiff such as equity will enjoin. That action is the institution and prosecution *af* a multiplicity of groundless suits and the taking of steps which, if taken, will result therein. This action if taken will be a wrong to plaintiff and such as equity will enjoin. It may sound strange to the defendants that in taking such action they will commit a wrong against plaintiff, but, if the claim that the assessment complained of is void on either ground relied on is correct, such is the legal conception of their action.

I must not leave this feature of the case without taking notice of the cases of Coulter v. Weir, 127 Fed. 897; Coulter v. L. & N. R. R. Co., 196 U. S. 599. Each of these cases was an appeal from a decree entered by me, one to the Sixth Circuit Court of Appeals and the other to the Supreme Court. Each was a suit complaining of an assessment made by the same board that made the assessment complained of herein and under the same statute. That complained of in the first case was against the Adams Express Company and in the second one against the plaintiff herein. In each case the decree entered was in favor of the plaintiff and in each on the appeal the decree was reversed, in the first case only in part. In each case it was

held that I had erred in upholding a suit against the state in violation of the Eleventh Amendment. In view of this experience it is quite important that I should not fall into the same error again. And this necessitates a somewhat careful consideration of both those cases.

284 In the Weir or Adams Express Company cases, the person then auditor of the state was the sole defendant. The relief decreed by me was that the defendant be enjoined from apportioning or certifying the assessment complained of in excess of a certain amount for local taxation and from collecting any state taxes thereon, those on the amount thereof not complained of having been paid, and that the assessment in excess thereof be set aside and held for naught. The portion of the decree affirmed was in so far as it enjoined the defendant from apportioning or certifying the excess portion of the assessment for local taxation. It was held that in so far the suit was maintainable and the plaintiff entitled to relief. Judge Lurton said:

"This suit is clearly maintainable so far as it seeks to enjoin the defendant from certifying the assessments complained of to the County Court Clerks. The suit to that extent is a suit against Coulter as an individual and the object is to restrain him from certifying the assessment made by the state board, which he claims he is required to by the law of the state, but which the complainants say is not valid authority. Coulter must, therefore, justify himself by showing, if he can, that the authority under which he claims to act is sufficient."

He cited in support of this decision the prior decision of that Court in the case of Taylor v. L. & N. R. R. Co., 88 Fed. 350 and the decision of the Supreme Court of the United States in the case of Stone, Auditor v. Farmers Bank, 174 U. S. 409. The portion of the decree reversed was in so far as it related to state taxes, i. e., set aside and, held for naught the assessment in excess of a certain sum and enjoined the defendant from collecting state taxes on such excess. It

285 was held that in so far as the decree set aside and annulled the assessment it was relief against the state of Kentucky and hence erroneous. Judge Lurton said:

"The Court in this exceeded its jurisdiction, for jurisdiction over the defendant did not give it jurisdiction over the state of Kentucky as the decree seems to assume."

Undoubtedly in so far the judgment was erroneous and for that reason if none other it was not relief against the defendant. This feature of the decree escaped my attention and I cannot say now that had I noticed it the result would have been different. The ground upon which the decree was held to be erroneous in so far as it enjoined the defendant from collecting any taxes on the excess was that the defendant had nothing to do with collecting state taxes. Judge Lurton said:

"Counsel representing the appellee have not pointed out any provision of law under which the defendant, as auditor, had any power or authority to coerce the payment of the tax so assessed, and we have searched in vain for any remedy against recalcitrant tax payers of

such a franchise tax, so far as same is due the state, other than those found in section 4091 and 113 Kentucky Statutes 1903."

He expressly recognized that if the defendant had anything to do with the collection of state taxes the suit was maintainable against him to enjoin him from attempting to collect them, the same as it was maintainable against him to enjoin him from apportioning or certifying the assessment for local taxation which there was no question it was his function to do. He said:

"If the defendant had been about to take some step under
286 color of the law tending to complete the assessment, or if he had been authorized to seize property and was about to do so, then he was, assuming the case to be with the complainant on the merits, about to commit a trespass, for which he would be individually liable, and in a proper case equity might enjoin his proposed action upon the ground of his want of legal authority. But this is not the case made in respect to the tax due the state and the bill, so far as it sought relief against the state tax, must be dismissed without regard to the merits."

There are provisions in the statutes of Kentucky making it the duty of the auditor to enter in account as a demand payable at the treasury such state taxes, to report to the attorney general a delinquency arising from a failure to pay them, and to cause proceedings to be instituted because of the failure, to which the Court's attention was not called and which it did not find in its research. They are sections 144, 145 and 152 Kentucky Statutes. Had the Court known of these provisions it would have upheld the decree in so far as it enjoined the defendant from taking steps to collect state taxes as well as in so far as it enjoined him from apportioning or certifying the assessment for local taxation.

Here no relief against the assessment is sought. It is not sought to have it set aside and held for naught. And the auditor is not the sole defendant. The attorney general and other prosecuting officers having to do with the institution and prosecution of proceedings against plaintiff because of its delinquency in payment of state taxes are defendants also and it is unquestionable that the institution of a multiplicity of groundless suits involving the same question is such a wrong as equity will enjoin. So the decision in this case is
287 an authority in support of the maintainability of this suit as to both state and local taxes instead of being against its maintainability to any extent. In the Louisville & Nashville Railroad Company case the same position was taken as in the Weir or Adams Express Company case. It was held that the suit was maintainable in so far as it sought to enjoin the apportionment and certification for local taxes, but not in so far as it sought to enjoin the collection of state taxes. The latter holding was based on the Weir or Adams Express Company case. Mr. Justice Holmes said:

"We need not stop to show that so much of the bill as seeks an injunction against collecting the state tax, and the portion of the decree which orders a receipt to be executed on the part of the state, cannot be maintained. See Coulter v. Weir, 127 Fed. 897, 906, 912. On the other hand in a proper case, a bill may be brought to

restrain apportionment and certification to the counties. Fargo v. Hart, 193 U. S., 490, 495, 503."

The suit was against not only the auditor but the members of the Board of Valuation and Assessment. Undoubtedly the decree in so far as it ordered a receipt to be executed on the part of the state was erroneous. I do not recall that I saw the decree after handing down my opinion in the case and I cannot say that it would have made any difference had I seen it. My opinion in the case, reported in 131 Fed., 282, however, shows that as I view the matter the sole relief sought was to enjoin the apportionment and certification of the assessment for local taxation. It is certain that there is nothing in this decision against the maintainabiiity of this suit in toto. So far as the decision as to state taxes was concerned it took for granted what had been held in the Weir or Adams Express Company
288 case, that the auditor had nothing to do with collecting state taxes and the attorney general and other prosecuting officers were not defendants and no injunction was sought against institution and prosecution of proceedings for deli-quency in payment of state taxes. There is, therefore, nothing in this decision in support of the contention that this suit is not maintainable because it is a suit against the state.

Finally it is to be noted that if this suit had been brought in the State Court instead of this Court it would have been held maintainable. The Court of Appeals has frequently sustained suits in the state Court against state officers in which complaint was made of assessment made by the Board of Valuation and Assessment under the statute in question here and relief was sought against state as well as local taxes. The following are cases of this sort, to-wit:

Coulter v. Louisville Bridge Company, 114 Ky., 42.
Ætna Life Ins. Co. v. Coulter, 115 Ky., 787.
Fidelity & Casualty Co. v. Coulter, 115 Ky., 805.
Hager v. American Surety Company, 121 Ky., 791.
James v. Kentucky Refining Company, 132 Ky., 353.
James v. U. S. Fidelity & Guarantee Company, 133 Ky., 299.
James v. American Surety Company, 133 Ky., 313.

The suits in the Ætna Life Insurance Company, Fidelity & Casualty Company, United States Fidelity & Guaranty Company and the last of the two American Surety Company cases were suits against the members of the Board of Valuation and Assessment to enjoin them from making an assessment. The suits in the
289 Louisville Bridge Company and Kentucky Refining Company cases were suits against the auditor to enjoin him from collecting the state taxes due on assessments made by the Board of Valuation and Assessment. And the first American Surety Company case was a suit against the members of the Board of Valuation and Assessment and the auditor brought after a final assessment had been made by the board to enjoin the members of the board from making the assessment and the auditor from collecting the state taxes due on the assessment. In each one of these seven cases, except the Kentucky Refining Company case the plaintiff was held

entitled to judgment and in the Kentucky Refining Company case it was denied judgment on the merits only. In no one of them was it intimated that the members of the board or the auditor were not suable. If this suit is not maintainable because it is a suit against the state then no one of those suits was maintainable on the same ground. For though the Eleventh Amendment has no application to suits in the state Court the common law rule that a sovereign is not suable, of which that amendment was an embodiment, has and is just as effective against the maintenance of a suit against the state as it is, and there was no statute permitting such suits to be brought. And the Louisville Bridge Company, first American Surety Company and Kentucky Refining Company cases are authorities against the position taken by Judge Lurton in the Weir or Adams Express Company case that I had erred in holding that the auditor had anything to do with collecting state taxes which he could be enjoined from doing. In view then of all that I have said I think that I am warranted in holding that defendant's preliminary contention
290 is not sound and in being confident that my position will be able to stand against just criticism.

(3) This brings me to the merits of the case, to-wit, the claim of plaintiff that the assessment is void. I will consider first the claim that it is void because the board did not follow the statute. As I make it there are three particulars in which it is claimed that the board did not so do. As stated the plaintiff's property is a physical and organic unit covering thirteen states. That which was assessable by the board was not that part of this unit which is in this state but that part of the intangible part thereof located therein, which I designate as its franchise therein. The method by which it valued and assessed it was this. It apportioned to this state a part of the total value of the whole unit and then deducted therefrom the assessed value of that part of its tangible property in this state, assessed by the railroad commission, another body, whose function it is to assess it. The balance it fixed as the value of that part of plaintiff's franchise in this state and is the assessment complained of. The apportionment of a part of the total value to this state was not made on a mileage basis. Roughly speaking the Kentucky mileage is 25 per cent of the total mileage. It apportioned, according to the presentation before me, 35 per cent thereof, or 10 per cent more than the mileage proportion. It obtained this percentage by averaging the gross receipts proportion and the net income proportion, as it determined them to be, respectively, with the mileage proportion. The plaintiff claims that this method was not in accordance with the statute. Its claim is that the board before apportioning to this state any part of the total value should have deducted therefrom the value of plaintiff's tangible property everywhere, i. e., in this state and elsewhere, then apportioned to this state a part of this balance and that it should have made this apportionment on a mileage basis. There were, therefore,
291 according to plaintiff, two particulars in which the board did not follow the statute in the method which it pursued in making the assessment. One was in not first deducting from

the total value the value of all the tangible property. And the other was in not apportioning what was apportioned to this state on a mileage basis. The other particular in which it is claimed the board did not follow the statute has to do with the hearing thereby provided.

To fully appreciate these claims of plaintiff and to dispose of them correctly a general survey of the statutory provisions under which the board acted will be helpful. They are, as heretofore stated, sections 4077 to 4081, inclusive, and 4083 Kentucky Statutes. Such a survey will bring out a number of imperfections therein and show that it is a rather crude piece of legislation. It originated at the first session of the legislature held after the adoption of the present constitution. Certain sections of that constitution had provided, with a note of emphasis, that taxes should be uniform on all property in the state—that all property not thereby specifically exempted should be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale—that all property whether owned by natural persons or corporations should be taxed in proportion to its value—and that all corporate property should pay the same rate of taxation paid by individual property. In compliance with these provisions an act entitled "An Act in relation to Revenue and Taxation" was passed at that session of the legislature and became law November 11, 1892. The first five and the seventh sections of article 3 thereof are, with the exception of certain changes made by subsequent amendments, to some of which reference will be made, the
292 same as the section of the Kentucky Statutes above referred to. Section 4083 relates to the matter of the hearing and will be passed by for the time being.

Section 4077 provided for the payment annually by eighteen enumerated corporations, companies or associations, of which "every railroad company or corporation" is the first named, and "every like company, corporation or association, also every other corporation, company or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service," of a tax on its franchise to the state and to the subordinate jurisdictions in which it may be exercised, in addition to the other taxes imposed on it by law, and for the fixing and apportionment to the subordinate jurisdictions of the value of such franchise by the auditor, treasurer and secretary of state, who were constituted a Board of Valuation and Assessment for that purpose. The Court of Appeals of Kentucky has held the following companies, not amongst those enumerated, to be covered by the general language used, to-wit, race track, tank car and refrigerator car companies.

Latonia A. & S. Association v. Donnelly, 106 Ky. 325.
Louisville Tank Line Co. v. Commonwealth, 123 Ky. 81.
Morrell Refrigerator Car Co. v. Commonwealth, 128 Ky. 447.

It has held the following companies not to be covered thereby, to-wit; ordinary business corporations, insurance companies and title companies.

Louisville Tobacco Warehouse Co. v. Commonwealth, 106 Ky. 165.

293 Ætna Life Insurance Company v. Coulter, 115 Ky. 787.
Fidelity & Casualty Company v. Coulter, 115 Ky. 11.
Hager v. Louisville Title Company.

As to the companies covered by the section, those enumerated and those held by the Court of Appeals to be within the general language used it is to be noted that all of them except one conduct and operate their business along fixed and definite lines. The one that does not so operate and conduct its business is a guarantee or security company. The lines of a number of those who so operate and conduct their business are limited to this state, and most of these usually, if not always, to a single subordinate jurisdiction therein. They are, gas, water, street railroad, electric power, turnpike and race track companies. The lines of most of them cover other states as well as this state. They are a railroad, ferry, bridge, express, telegraph, press dispatch, telephone, palace car, dining car, sleeping car, chair car, tank car and refrigerator car companies. Of these a ferry company and a bridge company are limited to only one other state. The properties of a railroad company, bridge, telegraph, and telephone companies constitute physical and organic units; those of the other companies organic units only. These companies may be placed in three classes, to-wit; companies which operate and conduct their business wholly in this state, companies which operate and conduct their business partly in this state and partly elsewhere and companies which operate and conduct their business wholly elsewhere. So far as the first two classes are concerned it is immaterial where they were organized. It is sufficient that they wholly or partly operate and conduct their business in this state. So far as the last class is concerned it is essential that
294 they be organized in this state, for as they operate and conduct their business wholly elsewhere there is no other basis of jurisdiction. Each of these three classes of companies may be subdivided into companies which operate and conduct their business along definite and fixed lines and those which do not. But it is not material to note this except in case of the second class, i. e., companies which operate and conduct their business partly in this state and partly elsewhere.

Section 4078 provides for all the companies covered by section 4077 making and delivering to the auditor a statement as to certain enumerated facts essential to enable the board to fix the value of the franchise which it is required to assess. The facts as to which they are required to make statement are as follows; to-wit, name and principal place of business, kind of business, amount of capital stock, preferred and common, number of shares of each amount of stock paid up, par and real value thereof, highest price at which such stock was sold at a bona fide sale within twelve months next

before the thirtieth of June of the year in which the statement is made, amount of surplus funds and undivided profits and all other assets, total amount of indebtedness as principal, amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the thirtieth of June of the year in which the statement is made, amount and kind of tangible property in this state and, where situated, assessed or liable to assessment in this state, and fair cash value thereof estimated at the price it would bring at a fair voluntary sale. It provides further that they shall make a statement as "to such other facts as the auditor may require."

295 Section 4079 is two-fold in character. It consists of three sentences. The last sentence is divided into two parts by the word "Provided" which seems to have been used without significance. The first two sentences and the first part of the last sentence relate to the statement which is the subject matter of section 4078. Each of the first two sentences provide for its covering additional facts. The first sentence is in these words:

"Where the line or lines of any such corporation, company or association extend beyond the limits of the state or county the statement shall, in addition to the other facts heretofore required, show the length of entire lines operated, owned, leased or controlled in this state and in each county, incorporated city, town or taxing district and the entire line operated, controlled, leased or owned elsewhere."

This sentence has application to the first two classes of companies of the three into which I have divided the companies covered by section 4077, to-wit: those which operate and conduct their business wholly in this state and those which so do partly in this state and partly elsewhere. It does not have application to all the companies in those two classes. It has application to those only of the first class which operate and conduct their business along definite and fixed lines, where the lines extend beyond the limits of one county and to those only of the second class which so do along such lines. It requires the companies to which it has application to make statement as to the additional facts therein referred to.

The second sentence is in these words, to-wit:

"If the corporation, company or association be organized under the laws of any other state or governmental or organized and
296 incorporated in this state, but operating and conducting its business in other states as well as in this state, the statement shall show the following facts in addition to the facts hereinbefore required; the gross and net income or earnings received in this state and out of this state on business done in this state and elsewhere during the twelve months next before the thirtieth day of June of the year in which this assessment is required to be made."

This sentence too like the first requires the companies to which it has application to make statement as to certain additional facts. Literally it may be said that it has application to all companies of the second class, i. e., which operate and conduct their business in this state and elsewhere. Literally also the place of organization

has something to do with distinguishing the companies to which this statement applies. But as it covers companies organized both in this state and elsewhere, i. e. all possible places of organization, it is apparent that so much of the sentence is without significance and mere surplusage. And though the letter of the sentence makes it applicable to all companies of the second class it is clear that it has application to only such of those companies as do not operate and conduct their business along definite and fixed lines. The first sentence of the section provides as to what additional facts such of those companies as so do along such lines shall make statement; and, as we proceed, an additional consideration will be noted which makes it conclusive that it was not intended that it should have application to such of those companies as operate and conduct their business along definite and fixed lines.

The first part of the third sentence of section 4079 permits the board to excuse a statement as to any of the facts required
297 where it is impossible to make a correct statement as to it or it will not afford valuable information in determining the value of the franchise to be taxed.

The last part of the third sentence of section 4079, section 4080 and section 4081 are alike in that each has to do with prescribing a method or methods for fixing the value of the franchise of companies covered by section 4077 to be followed by the board. In so far as the methods thus prescribed apply the board is limited to them. It cannot do otherwise than follow them. Together they prescribe four methods—section 4079 one, section 4080 one, and section 4081 two. Literally section 4080 prescribes two, but they are alternative methods applicable to the same companies. But the Court of Appeals in the case of James v. American Surety Company, 133 Ky. 313, has held that they prescribe but one method. Originally section 4081 prescribed but one method. The other or fourth and last method was prescribed March 15, 1906, when the whole act on the subject of revenue and taxation was re-enacted with certain changes. Theretofore no method had been prescribed for assessing the franchise of companies of the third class, covered by section 4077, to-wit: companies which operate and conduct their business wholly elsewhere, but have been organized in this state. The method so prescribed is applicable to those companies and it is not important to set forth in detail that method. Our attention will be limited to the first, second and third methods, prescribed respectively in the last part of the third sentence of section 4079, section 4080 and section 4081. The last part of the third sentence of
298 section 4079 is the same as it was when originally enacted in 1892. It is in these words:

"That said board, from said statement and from such other evidence as it may have if such corporation, company or association be organized under the laws of this state shall fix the value of the capital stock of the corporation, company or association as provided in the next succeeding section and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be

the value of its corporate franchise subject to taxation as aforesaid."

Literally the application of the method so prescribed is not determined by the classification I have made of the companies covered by section 4077, but by the place of organization, which is not a feature of that classification. So considered, i. e. literally it applies only to companies organized in this state and to all companies so organized. But it cannot have application to all companies so organized because to so construe it would render it unconstitutional. The first step in the method is to fix the value of the capital stock of the company. The words "capital stock" as used in this and the other sections of the statutory provisions under consideration *has* been construed to mean the entire property of the company, tangible and intangible, and when used in the course of this opinion that is the sense in which they are used. In case then of a company organized in this state, but owning property elsewhere, this property would be included in fixing the value of the capital stock, and, as the next and only other step is to deduct the assessed value of the tangible property in this state, the balance to be the value of
299 the franchise, the assessment thereof would include the property elsewhere. Such an assessment would deprive the company of its property without due process of law and hence would be unconstitutional. The Court of Appeals of Kentucky upheld an assessment of such a company where this method had been applied in the case of Louisville & Jeffersonville Ferry Company v. Com., 108 Ky. 717. The company there was a Kentucky corporation operating a ferry between Kentucky and Indiana and owning a ferry franchise in both states. The ferry franchise in Indiana was included in the assessment. On appeal to the Supreme Court of the United States it held that the assessment was invalid and reversed the judgment of the lower Court. Louisville & Jeffersonville Ferry Co. v. Com., 188 U. S. 385. The letter of this portion of section 4079 would include all companies of the third class, i. e. which operate and conduct their business wholly elsewhere, but are organized in this state, like the Southern Pacific Railway Company. If then this method is limited to companies organized in this state, to render it constitutional it must be limited further to such of those companies as operate and conduct their business and have their property wholly in this state, i. e. to all companies of the first class organized in this state. Under this construction it has no application to companies organized elsewhere who also operate and conduct their business and have their property wholly in this state and, as we shall see, the other two methods have no application to them, no method has been prescribed for assessing their franchise. And either this position will have to be taken or the words as to organization in this state will have to be disregarded and so much of section 4079 construed to have application to all companies of the
300 first class, i. e. which operate and conduct their business and have their property wholly in this state.

Section 4080 prescribes the second method. As originally enacted it was as follows, to-wit:

"If the corporation, company or association be organized under

the laws of any other state or government, except as provided in the next section, the board shall fix the value of the capital stock as hereinbefore provided and will determine from the amount of the gross receipts of such corporation, company or association in this state and elsewhere the proportion which the gross receipts in this state within twelve months next before the fifteenth of September of the year in which the assessment was made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock, less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this state."

It was amended by the revision act of March 15, 1906, hereinbefore referred to and as amended and as it now is it is as follows, to-wit:

"If the corporation, company or association be organized under the laws of any other state or government, except as provided in the next section, the board shall fix the capital stock in this state by capitalizing the net income derived in this state or it shall fix the capital stock as hereinbefore provided and will determine from the amount of the gross receipts of such corporation, company or association in this state and elsewhere, the proportion which the gross receipts of this state, within the twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the
301 entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this state less the assessed value of the tangible property assessed, or liable to assessment, in this state, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this state."

This section as originally and as amended is like so much of section 4079 as prescribes the first method in that according to its letter the place of organization has to do with determining the companies to which it is applicable. It, however, is not the sole factor in so determining. The character of the method prescribed shows that it has application only to companies of the second class, i. e. companies which operate and conduct their business partly in this state and partly elsewhere, and in view of the third method prescribed by section 4081, it must be held to have application to such companies only as do not so do along definite and fixed lines. If then the place of organization is a factor in determining the companies to which it has application no method has been prescribed for assessing the franchise of companies of the second class which do not operate and conduct their business along definite and fixed lines and which have been organized in this state. That the intention was that this method should have application to companies organized in this state as well as those organized elsewhere is to be inferred from the fact that the second sentence of section 4079, which provides for the statement to be filed by the companies to which it applies containing certain facts in addition to those set forth in section 4078 and which information is essential to enable the second method to be applied and was enacted

for that purpose, is not limited to companies organized else-
302 where than in this state but covers those organized in this state as well as those organized elsewhere. This second method then should be construed as applicable to all companies of the second class which do not operate and conduct their business along definite and fixed lines, without reference to whether they were organized elsewhere or in this state or it has to be accepted that no method has been prescribed for assessing the franchise of such of those companies as have been organized in this state.

As originally enacted the section treated the property of the companies to which it had application as a unit and provided for an apportionment of a part thereof to this state on a gross receipts basis, i. e. of the same proportion of the value of the capital stock which the gross receipts in this state is of the whole gross receipts.

In the case of Hager v. American Surety Company, 121 Ky. 791, it was held that the board in assessing the franchise of a company to which section 4080 applied was restricted to this method and had no right to treat the part of the franchise in this state as an independent whole in itself and fix its value by a capitalization of the net earnings in this state. This was the occasion of the change in section 4080 made by the revision act of March 15, 1906. According to the section as changed what was done was to prescribe an additional method and to give the board the right to choose between them. This at least was the letter of the change. And the alternative method which it prescribed was to treat the part of the franchise in this state as an independent whole in itself and fix its value by a capitalization of the net earnings therein. The Court of Ap-
303 peals, however, as heretofore stated, in the Kentucky Refining Company case held that the legislature did not so intend, but intended that both methods should be used at the same time and that to make the letter conform to such intent the word "and" should be substituted for the word "or." The two methods are opposites. By the original method the part was to be treated as a part of a larger whole, and by the new method it was to be treated as an independent whole in itself. According to this construction, therefore, we have what may be characterized as an enforced "harmony of opposites." The decision is bottomed on the idea that the legislature in empowering a tribunal to assess property must prescribe the method by which it is to value it. Of course, if this is so, it has no power to leave to that body the discretion of making a choice between two alternative methods. But I submit that this idea is not sound. The legislature does not have to prescribe the method by which such a tribunal is to value the property which it is its duty to assess. It can leave to it the matter of adopting a reasonable or suitable method. The authorities relied on as supporting the position do not, in my opinion, do so. It is against the position that the statute does not, as we shall see, prescribe the method of valuing the capital stock, the first step in each of the three methods, and it has been recognized by the Court of Appeals from the beginning of this legislation that the board has the right to choose between two methods of so valuing, i. e. the stock and bond and the capitalization methods. The later decision in the case

of Southern Pacific Ry. Co. v. Commonwealth, 134 Ky. 410, is against it. It was there held as to a company of the third class, i. e. organized in this state, but operating and conducting its busi-
304 ness wholly elsewhere prior to March 15, 1906, when no method had been prescribed for assessing the franchise in the state of such a company that the board had the power to assess it and to adopt a reasonable and suitable method for so doing. There was, therefore, no reason for holding that the legislature did not mean what it said and to leave it to the board to adopt which ever method was most advantageous to the state.

Section 4081 prescribes the third method with which we have to do in this case. As originally enacted it is in these words, to-wit:

"If the corporation organized under the laws of this state or of some other state or government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of this state, the said board will fix the value of the capital stock as hereinbefore provided and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this state bears to the lines owned, leased or controlled in this state and elsewhere, shall be the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable for taxation in each county, incorporated city, town or district through, or into which, such lines pass or *is* operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in the state, less the value of any tangible property assessed or liable to assessment in any such county, city, town or taxing district."

The section has been amended twice since its original enactement. The first amendment was made at the same session of the legislature, near its close, it being a long one, i. e. June 9, 1893. It consisted simply in inserting the words "considered in fixing" between
305 the words "shall be" and "the value of the corporate franchise," so that it provided, instead of as originally, that the part apportioned to this state should be the value of the franchise in this state, that it should be considered in fixing such value. The other amendment was by the revision act of March 15, 1906. It omitted the concluding clause, to-wit: "less the value of any tangible property assessed, or liable to assessment, in any such county, city, town or taxing district," and added two other clauses. One was the words "or a corporation performing any other public service" inserted after the words "chair car company" the last of the eight companies enumerated therein so that it would not be limited thereto. The other prescribed the fourth method of assessment hereinbefore referred to applicable to companies organized under the laws of this state which operate and conduct their business along definite and fixed lines entirely elsewhere. As thus changed and as it was at the time when the assessment complained of was made the section was as follows, to-wit:

"If the corporation organized under the laws of this state or some other state or government be a railroad, telegraph, telephone,

express, sleeping, dining, palace or chair car company, or a corporation performing any other public service, the lines of which extend beyond the limits of the state, the said board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into
306 which such lines pass or are operated in the same proportion that the length of the line in such county, city, town or district bears to the whole length of line in this state; but if any such railroad or other corporation organized under the laws of this state have all of its lines outside of this state, the said board shall fix the value of its entire capital stock as hereinbefore provided and apportion to this state for taxation therein the proper proportion and not less than one per cent of its said capital stock, and the amount so apportioned shall be the value of its intangible property including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this state and in the county, city, town and district where its principal place of business in this state may be located."

In determining the companies to which this method has application here as in the case of the other two methods apparently the place of their organization is a factor. But as here the language used covers both this state and elsewhere as places of organization, there can be no question that, however, it may be as to the other two methods the place of organization is not a determining factor as to the application of the third method. As originally enacted it applied to such of the companies of the second class as were enumerated, being eight in number, which operate and conduct their business both in this state and elsewhere along definite and fixed lines. By the amendment of March 15, 1906, the section was changed so as to make the third method applicable to all such companies as performed any other public service than that performed by the eight enumerated companies.

It is clear then that down to the revision act of March 15, 1906, no method was prescribed for assessing the franchise in this state of certain of the companies covered by section 4077. This
307 was the case of all companies of the third class, i. e. companies organized in this state and operating and conducting their business wholly elsewhere. It was the case as to all companies of the second class, i. e. companies operating and conducting their business partly in this state and partly elsewhere along definite and fixed lines not included by the eight companies enumerated in section 4081. This was the case as to all bridge and ferry companies so operating and conducting their business. And it is now the case as to all such companies not included by those eight companies or performing any other public service. It is now and always

has been the case as to companies of the first class, that is companies which operate and conduct their business wholly in this state but organized elsewhere if that portion of section 4079 prescribing the first method limits it to such companies as have been organized in this state and as to companies of the second class, i. e. companies which operate and conduct their business partly in this state and partly elsewhere, but not along definite and fixed lines, but organized in this state, if section 4080 prescribing the second method limits it to such companies as have been organized elsewhere. The Court of Appeals has had to deal with the question as to how companies covered by section 4077 as to which no method of assessment was so prescribed should be assessed. It had to deal with it in the Southern Pacific Railroad Company case hereinbefore referred to and I have indicated how it dealt with the question there. The case was decided after March 15, 1906, when the act prescribing a method for such cases became the law, but it involved years prior thereto. That Court had to deal with it in the case of Morell Refrigerator Car Company v. Commonwealth, 128 Ky. 447.
308 The company there involved was a refrigerator car company which operated and conducted its business partly in this state and partly elsewhere along definite and fixed lines but which was not one of the eight companies enumerated in section 4081 and was not regarded as performing a public service. It was not dealt with as it was in the subsequent Southern Pacific Railroad Company case, but section 4081 was construed to apply not only to the companies covered by its language, but all companies like those enumerated and hence that that method was applicable to it. The earlier case of Louisville Tank Line Co. v. Commonwealth, 123 Ky. 81, involved the question, but it does not seem to have been raised there.

The true view of the matter seems to me to be this. Section 4077 expressly provides that all the companies covered by it shall pay a franchise tax and empowers the board to make the assessment. The fact that no method has been prescribed for making the assessment of any company does not relieve it from assessment and from the tax. There is simply no method of assessment prescribed. This leaves the matter so that the board can adopt a reasonable method. And it should be taken that the legislature so intended. And a reasonable method is one similar to that prescribed in analogous cases, if there are such, and, if not, such as is reasonable under the circumstances. A similar line of reasoning was taken by me in the field of federal jurisdiction in the case of Kentucky Coal Lands Co. v. Mineral Development Co., 191 Fed. 899. The first sentence of the first section of the jurisdictional act of 1887-88 confers essential jurisdiction on the Circuit Courts of the United States in certain cases. The middle clause of the
309 second section thereof—the venue clause—distributes that jurisdiction amongst those courts. It does not distribute all of it. It leaves a portion thereof undistributed, such as suits against aliens and suits of a local nature. I there pointed out that the fact that a portion of such jurisdiction so conferred was not dis-

tributed did not deprive the Circuit Courts of jurisdiction thereof. The sole effect of its not being distributed was that it must be treated as distributed along reasonable lines.

If then this position is sound and the first method of assessment is to be confined to companies organized under the laws of this state in accordance with the letter of section 4079, so that no method is prescribed for assessing companies organized under the laws of other states which operate and conduct their business and have their property wholly in this state, it should be taken that the board has the right to adopt a reasonable method and a reasonable method is that prescribed in section 4079 as it is an analogous case. And if the second method is to be restricted to companies organized under the laws of other states in accordance with the letter of section 4080, so that no method is prescribed for assessing companies which operate and conduct their business partly in this state and partly out of it, but not on definite and fixed lines, the same course is to be pursued.

So much then as to the methods of assessment prescribed, their applicability and the course to be pursued where no applicable method has been prescribed. It is now in order to consider the methods themselves.

The first step in the first, second and third methods, are exactly alike. It is to fix the value of the capital stock of the company. It is not important to deal with the method of fixing such value.
310 It is sufficient to note that the statute prescribes none. It is true that section 4079 says that the board shall fix it "as provided in the next succeeding section." But the next succeeding section, to-wit: section 4080, provides that the board, if it adopts the third method, shall fix it "as hereinbefore provided." These two clauses cancel each other and leave no method prescribed. So section 4081 says that it shall fix the value of capital stock "as hereinbefore provided." But as there is no prior provision on this subject this clause is also without meaning. The board, therefore, in taking this first step in these three methods is left to adopt a reasonable method of fixing such value. After the taking of this first step the three methods part company. According to the first method the next step is to deduct from the valuation so fixed the assessed value of the entire tangible property which is all in this state. The provision then is that the remainder thus found shall be the value of the company's franchise. This method, therefore, consists of but two steps, fixing the value of the entire property and deducting the assessed value of the entire tangible property. By it the board does not directly fix the value of the franchise. That results automatically from the taking of these two steps.

The several steps of the original second and the third methods are alike in that neither consists of a deduction of tangible property, like the second step in the first method, but of an apportionment of the valuation of the entire property. They differ from each other in the manner of apportionment which is prescribed. The apportionment in the original second method is on a gross receipts basis and that in the third method on a mileage basis. In the

311 nature of things the apportionment in the original second method cannot be on a mileage basis, because the companies to which it is applicable do not operate and conduct their business on definite and fixed lines. According to it the ratio of the gross receipts in this state to the total receipts determines what part of the total valuation shall be apportioned to this state and that absolutely so.

The third and last step in the original second method is to deduct from the part of the total valuation thus apportioned to this state the assessed value of the tangible property in this state. The balance is to be taken as the value of the franchise therein. This method, therefore, consists of three distinct steps—valuation of the entire property in and out of this state—apportionment of a part of such valuation to this state on a gross receipt basis, and a deduction from such part of the assessed value of the tangible property in this state. By it too the value of the franchise in this state is not fixed directly by the board. It results automatically from the taking of these three steps. The act of March 15, 1906, treating it as prescribing an alternative method for fixing the value of the franchise of such companies in this state, made a radical departure from the original method applicable to such companies and introduced an entirely new thought into the methods of fixing the value of the franchise in this state of companies which operate and conduct their business partly in and partly out of the state. The old thought was that it could only be done by the apportioning a part of the total value of the franchise of such companies to this state. The new thought so introduced was to disregard the whole and treat the part in Kentucky inde-
312 pendently thereof, as if it were the whole. The alternative method provided by the act of March 15, 1906, applicable to companies covered by section 4080, therefore, included no valuation of the whole and apportioning of a part thereof to this state. It called for two steps only. The first was a valuation of the part of the whole in this state, as if it were the whole, and the second was a deduction therefrom of the assessed value of the tangible property in this state. It had a novel feature further in that a method of assessing the value of such part was prescribed, to-wit: the capitalization of the net earnings in this state. Here too the value of the franchise in this state is not fixed directly by the board, but results automatically from the taking of these two steps. It is substantially like the first method. Each consists of two steps. In each the first step consists in the valuation of the entire property in Kentucky; and the second in deducting the assessed value of the tangible property in this state. They differ only in one particular. In the first method the board is not limited as to how it shall value the entire property in this state, whereas in this alternative method so prescribed it is limited to a capitalization of the net earnings in this state. I will not undertake to describe in detail the process under the construction of section 4080 as amended in the Kentucky Refining Company case. I find it difficult to do so and it is not important. This completes our general survey of sections 4077 to 4081, inclusive, and of any detailed reference to sections 4077 to 4081.

We come now to a further detailed consideration of section 4081, in so far as it relates to the third method, which is the one involved here, as plaintiff is a railroad company, whose line extends beyond the limits of this state and hence is one of the eight companies
313 enumerated therein to which that method is applicable, with a view of determining whether plaintiff's contention in regard to that method and as to the two particulars in which the board failed to follow it is sound. And first as to its contention that the second step in the method is a deduction of the value of the entire tangible property both in and out of this state. This should be first viewed as it would have to be under the section as it was originally before the changes introduced by the amendment of June 9, 1893, and the reenactment of March 15, 1906, and then the effect of those changes should be considered. As already stated the first step then, as now, consisted of the fixing of the value of the capital stock. As to this there is no dispute. According to plaintiff's contention this step is followed by two others, the taking of which results automatically in fixing the value of its franchise in this state. The second step consists of a deduction, to-wit: of the value of the entire tangible property, both in and out of this state, and the third and last step of an apportionment to this state of a part of the remainder left after making the deduction and that on a strictly mileage basis. But if such are the second and third steps of the third method they are to be found elsewhere than in the letter of section 4081. The letter thereof provides for no such steps. The second step which its letter calls for is not a deduction but an apportionment. The apportionment which it calls for is of a part of the total valuation on a mileage basis. And this is the only other step which it calls for. It then provides that the part so apportioned to this state shall be the value of the franchise in this state and that it shall be liable to taxation in the several subordinate jurisdictions in which it is located on
314 a mileage basis less the tangible property therein. It is in this connection only that any reference is made to a deduction of the tangible property and here it has reference solely to the tangible property in this state. It is evident that the provision as to a deduction was misplaced. According to the letter of the section the part of the total valuation apportioned to this state on a mileage basis was the value of the franchise in this state. But the total valuation included both tangible and intangible property, the part so apportioned to this state would be not merely the value of the intangible property, but both the tangible and intangible property therein. If such apportionment were to be taken as the value of the intangible property in this state then the companies to which the method was applied would have to pay a double tax to the state on its tangible property—on it as such and on it as included in this apportionment. But the legislature could not have so intended. The section was so worded that they would not have to pay a double tax thereon to the subordinate jurisdictions and it was as little intended that it should pay a double tax thereon to the state. Had the provision as to deduction been inserted, instead of at the close of the section, just after the provision as to the apportionment of a part of the total valuation to

this state and the requirement been that it should be made from the part so apportioned and that the balance should be apportioned amongst the subordinate jurisdictions then there would have been nothing in the letter of the section favoring payment of double taxes on the tangible property in this state. It should, therefore, be taken that the intent was that the deduction should be made from
315 the part apportioned to the state and not from the parts apportioned to the subordinate jurisdictions.

By this time one has become used to imperfections in this legislation. We have found that it uses the word "provided" without significance; that the application of the first method has to be limited to companies which operate and conduct their business and have their property wholly in this State to render it constitutional; that it thinks that the place of organization of the companies is of significance in determining the application of the three methods which it provided, when it is not—and that it thinks that it has provided a method of valuing the capital stock and that it has prescribed a method for assessing the franchise of all companies covered by section 4077 when it has done neither. He is not, therefore, surprised when he comes across such an imperfection here. In the case of Southern Railway Company v. Commonwealth, 113 Ky. 657, the railroad companies of the state were willing to concede that the assessed value of the tangible property in this state should be deducted from the part apportioned thereto before an apportionment amongst the subordinate jurisdictions and claimed that by virtue of the provision as to deducting same after such apportionment from the parts so apportioned that they were entitled to have same deducted again. Thereby they would get a double deduction, and in this way get back the taxes which they were bound to pay on their tangible property as such. But the Court of Appeals could not see it that way.

There is, therefore, absolutely nothing in section 4081 that allows of a deduction of the value of the tangible property both in this state and out of it from the valuation of both tangible and intangible property everywhere and then an apportionment of a part of the balance to this state on a mileage or any other basis. The thought of the section must be taken to be that a part of the
316 valuation of the entire property is first to be apportioned to this state and that then the assessed value of the tangible property therein is to be deducted therefrom. And to this conforms the thought of the companion sections. In none of the sections relating to the assessment of the franchises of companies covered by section 4077 is there the remotest reference to the deduction in any contingency of the value of the entire tangible property. In so far as any provision is made for a deduction it is always a deduction of the assessed value of the tangible property in this state. There are two other provisions for a deduction besides that contained in section 4081, which it seems to me was misplaced. One is in section 4079 as a step in the first method thereby prescribed. And the other is in section 4080 as a step in the second method thereby prescribed. And in each case the deduction called for is the assessed value of the

tangible property in this state. That may be said to be expected in connection with the first and alternative methods prescribed by the amendment of March 15, 1906, to section 4080 because in each of them the valuation from which the deduction is to be made is the valuation of the entire property in this state. But such is not the case as to the original second method. There, as in case of the third method involved here, there is a valuation of the entire property in and out of the state and an apportionment to this state on a gross receipts basis, and the requirement is not that the value of the tangible property both in and out of the state shall be first deducted, and then an apportionment made, but that an apportionment shall be first made and then the assessed value of the property in this state shall be deducted. It is expressly provided that such
317 shall be the method of procedure without any ambiguity. The statement provided for by section 4078 to be considered by the board in making the assessment calls for information as to the value of the tangible property, but it is limited to the assessed value of the tangible property in this state. There is not a word in the provisions in regard to this statement about any information being furnished as to the value of property elsewhere.

Thus far I have dealt with section 4081 as if it were now as it was when originally enacted. Do the changes subsequently made in it to any extent support plaintiff's contention? The change made by the amendment of June 9, 1893, has no bearing on the question now under consideration. It has bearing on the other part of plaintiff's contention, to-wit: that the section requires the apportionment to the state to be on a mileage basis absolutely. When I come to take up that part of its contention the effect of this change will be considered. By the change made by the act of March 15, 1906, the clause at the end of the section relating to a deduction of the tangible property in each subordinate jurisdiction from
318 the apportionment thereto, was omitted and the section as it now stands contains no express provision for a deduction of the value of the tangible property at any stage of the process of assessment. As heretofore stated the clause was improper at that place and had been the basis of a claim of a right to a double deduction of the assessed value of the tangible property. It was no doubt omitted for this reason. That it was not at the same time expressly provided that the assessed value of the tangible property in this state should be deducted from the part of the total value apportioned thereto can be *be* accounted for on no other ground than that it was thought to be clear that it was the thought of the section that such deduction should be made.

It seems to me, therefore, that the idea that the statute under which the board acted in making the assessment complained of requires first a deduction of the total value of the entire tangible property from the total value of the entire property and then an apportionment is utterly without warrant in the provisions thereof, and that there can be no doubt that what it contemplates is first an apportionment and then a deduction, the deduction to be of the assessed value of the tangible property in this state. In other words

the thought of the statute is first apportionment and then deduction and not first deducted and then apportionment and that the deduction is of the assessed value of the tangible property in this state and not of the value assessed or otherwise, of the entire tangible property in and out of the state. There is but one possible ground then on which plaintiff's contention in this particular can be upheld and that is that it is essential to construe the section as providing
first for a deduction of total value of entire tangible property
319 from total value of entire property and then an apportionment of a part of the balance to this state in order to keep it within constitutional limits. I have found it necessary to limit that portion of section 4079 prescribing the first method to companies which operate and conduct their business and have their entire property in this state in order to so keep it. And it may be necessary to reshape section 4081 in order to keep it within constitutional limits. How is it as to this? To answer the question we must equip ourselves with the thought of the Supreme Court of the United States on the matter of assessing for taxation in any given state the part of a unit covering several states in such state as a part thereof. As heretofore indicated such unit may be a physical and organic unit as in case of the property of a railroad, telegraph or telephone company or merely an organic unit as in case of an express company. The rules applicable to the assessment of such a part thereof as a part are precisely the same in both cases. That such part thereof can be valued as part of the whole, or in other words that it is not essential that it be valued without reference to the whole, as if it were itself the whole is well settled. Such an assessment does not involve the assessment in the state of property lying outside of it. It is taken for granted that such part of such unit is always of more value regarded as a part than as itself an independent whole and that, therefore, the state gains by so doing; and it is thought to be fair for the state to avail itself of such enhancement in value, for as the parts in other states contribute to its value so it contributes to their value. It is equally well settled that ordinarily, i. e. in the absence of special circumstances such
part thereof can and should be valued on a mileage basis,
320 i. e. at such a proportion of the value of the whole unit as the mileage in the state bears to the total mileage. It is an exceptional case where the part is not to be so valued. In any given case, nothing else appearing than the value of the whole and the proportionate mileage of the part, the value of the part is to be taken as the same proportion of the value of the whole. In starting out then to value the part, the presumption — that such is its value and such presumption is to be maintained until it is rebutted by the special circumstances or exceptional character of the particular case. In the case of State Railroad Tax Cases, 92 U. S. 608, where the apportionment involved was between subordinate jurisdictions in the same state Mr. Justice Miller said:

"It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been

devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

In the case of Pittsburg C. C. & St. L. R. R. Co. v. Backus, 154 U. S. 421, Mr. Justice Brewer said:

"It is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this Court several times as eminently fair."

321 And again in the case of Cleveland C. C. & St. L. R. R. Co. v. Backus, 154 U. S. 439, he said that one of the questions therein was:

"If an assessing board, seeking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoining state, ascertains the value of the whole line as a single property and then determines the value of that within the state, upon the mileage basis, is that a valuation of property outside of the state, and must the assessing board in order to keep within the limits of state jurisdiction, treat the part of the road within the state as an independent line, disconnected from the part without and place upon that property only the value which can be given to it if operated separately from the balance of the road?"

In answer to this question he said:

"It is assumed that no special circumstances exist to distinguish between the conditions in two states, such as terminal facilities of enormous value in one and not in another. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggregate of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. There is something which does not exist and cannot exist until the combination is formed."

322 Then in the case of Fargo v. Hart, 193 U. S., Mr. Justice Holmes said:

"And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing even though the other parts of the system are outside of the state. The sleepers and rails of a railroad company, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get the worth of such a line in the absence of anything more special by a mileage proportion."

These learned judges, therefore, characterize the method of determining the value of the part on a mileage basis as "reasonable and constitutional" and "eminently fair" and say that it may well be doubted whether any better mode has been devised. But they recognize that this is true "ordinarily" only or in the absence of "special circumstances" or "anything more special." A special circumstance recognized by Mr. Justice Brewer in one of the quotations heretofore made was the existence of "terminal facilities of enormous value" out of the state and not in it. Mr. Justice Holmes also recognized this as a special circumstance affecting the reasonableness of an apportionment on a mileage basis in the Fargo case. He there said:

"So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the case that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the
323 line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

In the Pittsburg C. C. & St. L. R. R. Co. case, Mr. Justice Brewer recognized another special circumstance affecting the rule in connection with the existence of terminal facilities of enormous value, to-wit: the requirement in another state for sole use therein of an "extra amount of rolling stock." He there said:

"It is true there may be exceptional cases, and the testimony offered in the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as for instances, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."

The special circumstances so recognized consists of more tangible property outside of the state than in it. I find no other special circumstance referred to as affecting the application of the rule of valuing on a mileage basis. In the Delaware Railroad Tax Case, 18 Wall. 206, it was held that if the tax there involved had been on the property of the company an assessment on the mileage basis would have been invalid because it would be a tax on property outside of the state. Mr. Justice Field there said:

"Assuming that the tax is upon the property of the corporation, if the ratio of the value of the property in Delaware to the
324 value of the whole property of the company be less than that which the length of the road in Delaware bears to its entire length, and such is admitted to be the fact, a tax imposed upon the property in Delaware, according to the ratio of the length of its road to the length of the whole road, must necessarily fall upon property out of the state. The length of the whole road is in round numbers one hundred miles; the length in Delaware is twenty-four miles.

The tax upon the property estimated according to this ratio would be in Delaware 24-100 or 6-25 of the amount of the tax upon the whole property. But the value of the property in Delaware is not 6-25 of the value of the whole property, but much less than this proportion would require."

It did not appear wherein the property outside of Delaware was proportionately worth more than that inside thereof. In the Fargo case the assessment against the American Express Company on a mileage basis was held invalid as including property outside of the state of Indiana, not because proportionately a greater portion of the unit was outsite of that state, but because it included property outside of the state, to-wit, stocks and bonds in New York, which were not used in the business and which, therefore, were no part of the unit.

In the case of W. U. Telegraph Company v. Massachusetts, 125 U. S. 530, apparently a special circumstance outside of the state of Massachusetts making against an assessment therein on the mileage basis, to-wit, the ownership of $3,000,000 of real estate, with the ownership of none therein, was held to be offset by a special circumstance within the state, to-wit: the existence proportionately of greater intangible property therein so that an assessment on a mile-
325 age basis was held to be valid notwithstanding the special circumstance outside of the state. Mr. Justice Miller said:

"It is very clear to us, when we consider the limited territorial extent of Massachusets, and the proportion of the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily or as a fair argument from the facts stated in the case, that there was injustice in the assessment for taxation."

It is to be noted in this connection that it would seem that in assessing the part of such a unit within the state as a part thereof, the determining by the board of how much of the unit is within the state is not such a determination that it is conclusive unless overthrown by fraud or mistake. In the Pittsburg C. C. & St. L. R. R. Co. case, Mr. Justice Brewer said:

"Whenever a question of fact is thus submitted to the determination of a special tribunal its decision creates something more than a mere presumption of fact, and, if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined. Here the question determined by the state board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board."

But in the Fargo case, Mr. Justice Holmes said:

"In Pittsburg C. C. & St. L. R. R. Co. v. Backus, there was reason to suspect an infraction of constitutional rights, but the secre-

326 tary of state testified that there was no assessment of property outside the state, and therefore the Court could not say that there was more than a possible over valuation by the board. Of course, if the board did not go beyond its jurisdiction; its decision was final. But the Court recognized that if the facts charged had appeared the case would have been different. In the express company's cases previously decided, it was pointed out that there was nothing to show that the line might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the company should prove the fact to be otherwise a different rule would apply and the statutes were construed not to prevent such a difference being taken into account."

And again he said:

"This cannot be treated as a case of mere overvaluation, but is an assessment made on unconstitutional principles."

In view then of this thought of the Supreme Court on the subject of assessing for taxation the part of such property unit located in this state is it essential to reshape section 4081 in so far as it relates to the the third method, or the one applicable here, so as to make it require that there should be first a deduction from the total value of the value of the total tangible property and then an apportionment in order that it may be constitutional?

I think not. If there is no special circumstance rendering the part elsewhere proportionately of more value than that in this state there certainly is not. In such a case it is to be taken that the part of the capital stock in this state is proportionately of the same value as the part elsewhere. This is true also of its separate parts,

327 to-wit: tangible property and intangible property. The value of the tangible property can first be deducted from that of the capital stock, which would leave the value of the intangible property and then a part thereof can be apportioned to this state on the mileage basis. But it can just as well and even better be done in this way: A part of the capital stock can be first apportioned to this state on the mileage basis and then the value of the tangible property in this state can be deducted therefrom. This would give exactly the same results as before. If there is a special circumstance rendering the tangible part of the part elsewhere proportionately of more value than that in this state, in order to keep from taxing such excess value elsewhere it is still not essential that it be first deducted and that then there be an apportionment. It can be handled by deducting from the value of the part of the capital stock apportioned to this state in addition to the assessed value of the tangible property in this state, the mileage proportion of such excess value included in the apportionment of a part of the capital stock thereto. Of course the simpler way is first to deduct the whole of such excess value, then to apportion the remainder on a mileage basis and then to deduct the assessed value of the tangible property in this state. The result is the same either way. I am only concerned to show that in order to keep from taxing in this state such excess value elsewhere it is not essential that it be first deducted and that then the remainder be apportioned. It can be handled as successfully the other way.

It is clear, therefore, that to keep the third method prescribed by section 4081 within constitutional limits it was not essential that it should have provided that the value of the entire tangible
328 property should be first deducted from the capital stock before an apportionment. It was sufficient that it provided for an apportionment of a part of the capital stock to this state on a mileage basis, with a deduction of the assessed value of the tangible part therein and permitted a deduction on account of any such excess value in either of the two ways suggested.

But it is urged by plaintiff that both the Court of Appeals of Kentucky and the Sixth Circuit Court of Appeals have held that the proper course is first to deduct the value of the entire tangible property and then to apportion the balance. Of course if this is so and the holding by either Court is not a mere dictum I am bound by it. The cases relied on are the following, to-wit: Commonwealth v. Covington & Cincinnati Bridge Co., 114 Ky., 343; Coulter v. Weir, supra.

To understand the Covington & Cincinnati Bridge Company case it is essential to take notice of the case of Henderson Bridge Co. v. Commonwealth, 99 Ky., 623, the first case to arise under the statutory provisions under consideration. The companies, the assessment of whose tangible properties in this state were involved in these two cases were bridge companies operating and conducting bridges across the Ohio river, one between this state and Indiana and the other between it and Ohio. As we have seen, the statute, as it then stood provided, no method for assessing the franchise of such companies in this state. Those companies did not operate and conduct their business and have their property wholly in this state and hence the first method prescribed by section 4079 did not apply to them. Though they operated and conducted their business both in and out of this state they did so along definite and fixed lines. Hence
329 the original second method prescribed by section 4080 did not apply to them. And though they operated and conducted their business along definite and fixed lines the third method prescribed by section 4081 did not apply to them because bridge companies were not one of the eight companies to whom that method was then limited. But the board having power to assess their intangible property in this state under section 4077 and no specific method being prescribed for such a case the board had a right to adopt a reasonable method and a reasonable method was that prescribed by section 4081 applying to other companies like it, which operated and conducted their business both in and out of the state and that along definite and fixed lines. The Henderson Bridge Company case was a suit by the Commonwealth against the company to recover the tax due it on an assessment made by the board. The method which it had used was first to value the whole property, then to deduct the assessed value of Indiana tangible, then to apportion to Kentucky a part of the balance on the mileage basis and then to deduct therefrom the assessed value of the Kentucky tangible, the balance being taken as the value of the intangible in Kentucky. The method erred in favor of the company in that it first deducted the

assessed value of the Indiana tangible. Thereby Kentucky shared with Indiana its tangible without Indiana sharing in turn its tangible with Kentucky. There should have been no deduction of the Indiana tangible. That this was erroneous was noted by Judge Hobson in the Covington & Cincinnati Bridge Company case.
330 That company was contending for the same method in its case. In response to this contention, he said:

"But that suit and all those following it were actions by the Commonwealth to recover taxes based on the assessment made by the board. The state was not complaining of the assessment; on the contrary, it was endeavoring to enforce it. It had no right of action except upon the assessment and no question, therefore, could be presented by the state as to the propriety of the assessment which it sought to enforce."

On the other hand the Commonwealth, appellant therein, contended that the proper method was first to value the whole, then to apportion a part thereof to this state on the mileage basis and then to deduct from such part the assessed value of the tangible in this state, the method which I have held is the one prescribed by section 4081 and applicable here, and in answer to this contention Judge Hobson said:

"We, therefore, conclude that the basis urged by appellant is the proper one for the assessment of the property."

So far certainly there is nothing favoring plaintiff's contention. On the contrary it is directly against it. But this is not all of the case. Judge Hobson had this to say in his opinion as to first deducting the value of the total tangible and then apportioning a part of the balance to Kentucky on a mileage basis, to-wit:

"If we subtract from the total value of all the property of appellee the value of its tangible property, the balance represents necessarily its intangible property; and as the constitution requires all property within the taxing district to bear its equal part of the public
331 burden, this intangible property so far as it is within the state must be taxed as other property. While it does not necessarily follow that all parts of a bridge are of equal value, still the fact remains that its whole value is due to its entirety, and that one part of the bridge is practically of no value, at least as a bridge, without the other. Prima facie, it should be presumed, where part of a bridge lies in Kentucky and part in another state, that the value of the structure in the two states is in proportion to the length of the bridge in each, for the value of the property depends upon its use as a bridge, and the franchise, it seems to us, must necessarily be apportioned the same way. If it should be shown that the property in the other state was of greater value per foot than the property in Kentucky, our officers are not concluded by the action of the officers of the other state, but could for themselves fix the value of the entire tangible property of the bridge and deduct this from the total value, which was in this case $1,330,000. But, there being no showing that there was any discrepancy in value between the Kentucky end of the bridge and the Ohio end it should be assumed, in the absence of proof

that the value of the property in Kentucky was in proportion to the length of the bridge in Kentucky."

In saying what he thus said, Judge Hobson was not indicating the "proper way" of making the assessment under the statute. He said this arguendo, i. e. in support of what he conceived to be the "proper way." For what he thus said is followed immediately by the statement heretofore quoted to this effect:

"We, therefore, conclude that the basis urged by appellant is the proper one for the assessment."

It followed therefrom that such was the "proper way" because it was based on the presumption that all parts of the bridge were of equal value and so of the franchise and the result of such way
332 was exactly the same as if the value of the whole tangible had been first deducted and then the balance apportioned.

But when we come to the Weir case it must be conceded that it contains an express holding in accordance with plaintiff's contention. The holding is based on what Judge Lurton took to be the holding of the Supreme Court in the case of Adams Express Co. v. Kentucky, 166 U. S. 171. In the Weir case Judge Lurton thus expressed himself:

"We, therefore, read the act as the Supreme Court seems to have read it in Adams Express Company v. Kentucky, as requiring the deduction of tangible property from the gross value of all corporate assets, whether such tangible property be within or without the state."

But did the Supreme Court so read the act in that case? Judge Lurton only says that "it seems to have so read it" as if he were not sure of his ground as to this. In that case Mr. Chief Justice Fuller said:

"But taking the whole act together, and in view of the provisions of section- 4078-4081, we agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense and that the legislative intention is plain that the entire property, tangible and intangible, of all corporations possessing no franchise should be valued as an entirety, the value of the tangible to be deducted, and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies whose lines extend beyond the limits of the state that their intangible property should be assessed on the basis of the mileage of their lines within and without the state."

333 Undoubtedly this has the seeming which Judge Lurton attributed to it. But the case involved no question of method and hence did not call for accuracy of statement regarding the matter. In the first clause of the quotation the first, original second and third methods which were then the only methods prescribed are treated as if they were exactly alike and hence one description is made to fit them all. What is said is true of the first method but not of the other two. As to the then second method, covered by section 4080, it is expressly provided that after valuing the entire property, tangible and intangible, a part shall be apportioned to this state on

the gross receipts basis and that then for the first time shall there be a deduction and that of the assessed value of the tangible property in this state. What is thus said, therefore, is an inaccurate obiter dictum. So was Judge Lurton's holding. There was no question of method involved in the Weir case. It involved the same question that was involved in the Fargo case and that is whether stocks and bonds in New York owned by the Adams Express Company and not used in its business could be treated as a part of its property unit, a part of which was in this state and assessable here. There is, therefore, nothing in either of the cases relied on against the position I feel constrained to take on the matter now under consideration. And on the contrary the decision in the Covington & Cincinnati Bridge Company case supports it. This position of plaintiff, therefore, is not sound.

(4) The other particular in which plaintiff claims that the board did not follow the statute, in the method which it adopted, was in allotting to this state more than the mileage proportion of its capital stock as the value of the part therein and in fixing the re-
334 mainder left after deducting from such allotment the assessed value of the tangible property in this state as the value of its franchise therein. As heretofore stated the proportion of Kentucky mileage to total mileage is 25 per cent in round numbers. The board allotted to this state 35 per cent of the value of plaintiff's capital stock, as the value of the part thereof in this state. It obtained this proportion by averaging the gross receipts proportion, which it determined to be 39 per cent, and the net income proportion, which it determined to be 41 per cent, with the mileage proportion. The plaintiff's position is that the statute requires the board absolutely, i. e. in all cases, to allot to this state the mileage proportion of the value of the capital stock as the value of the part thereof therein and to fix the remainder left after deducting from such allotment the assessed value of the tangible property in this state as the value of its franchise therein. I think it clear that here also plaintiff's position as to the requirement of the statute is wrong. The board is not required absolutely, i. e. in all cases, to so do. To construe the statute as so requiring would render it unconstitutional. If it so requires, then, in a case where that part of the capital stock of such a company elsewhere is by reason of some special circumstances proportionately of more value than the part in this state, the board is required to include in its assessment the mileage proportion of such excess value elsewhere, no part of which is subject to taxation in this state. Such was the character of the statute as originally enacted, i. e. before the amendment of June 9, 1893. And, I think, that it is to be accepted that the object of the amendment in providing that the board
335 should consider the mileage proportion of the value of the capital stock in fixing the value of the franchise instead of should take it absolutely as the value of the part of the capital stock in this state and fix it, less the assessed value of the tangible property as the value of the franchise, was to make it so that, in such a case the statute would not require the board to include in its assessment any part of the excess value elsewhere. The plaintiff has it that the

object of the amendment was to make it so that the board might deduct the assessed value of the tangible property in this state before apportioning the part apportioned to this state on a mileage basis, amongst the subordinate jurisdictions. But the section as originally enacted permitted it to make such deduction, as I have already held, the deducting clause being simply misplaced, i. e. after the apportionment to subordinate jurisdictions instead of before. Such, then, could not have been the object of the amendment. Its object, in part at least, was as I have stated it to have been. Under the statute as so amended the board can avoid including in its assessment any part of the excess value elsewhere in either of two ways. Either it can first deduct the whole of such excess value after fixing the value of the capital stock and then take the mileage proportion of the remainder as the value of the part thereof in this state, or it can apportion to this state the mileage proportion of the value of the capital stock and then deduct the mileage proportion of such excess value therefrom. And as the statute calls for an apportionment to this state of the mileage proportion of the value of the capital stock as the next step after fixing the value thereof—it so calls therefor in providing that it shall consider such mileage proportion—it would seem
336 that it contemplates that the deduction shall be made in this last way. But as the result is exactly the same each way, it is immaterial which way is adopted.

The statute of Indiana involved in the Pittsburg C. C. & St. L. R. R. Co. case and the Cleveland C. C & St. L. R. R. Co. case was substantially the same as section 4081 after the amendment. In the first of these cases Mr. Justice Brewer said:

"When a road runs through two states it is, as seen, helpful in determining the value of that part within one state to know the value of the road as a whole. It is not stated in this statute that when the value of a road running in two states is ascertained the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the state board."

And again, after referring to the testimony introduced on the trial of the case as to the special circumstances rendering that case an exceptional one, on the quotation heretofore made from the opinion he said:

"If testimony to this effect was presented by the company to the state board, it must be assumed in the absence of anything to the contrary that such board in making the assessment of track and rolling stock within the state took into account the peculiar and large value of such facilities and such extra rolling stock. But whether in any particular case matters are taken into consideration by the assessing board does not make against the validity of the law because it does not require that the valuation of the property within the state shall be absolutely determined upon a mileage basis."

337 And again he said:

"The certificate of the state board does not show that it reached its determination of the value of the property in Indiana by

first assessing the total value of the company's property and then dividing it on the mileage basis. It simply shows that it considered the matters which by the statute were required to be presented to it by the railroad company, as well as all other matters which in its judgment bore upon the question of value, and from such consideration reached the result announced, to-wit, the value of that part of the company's road in the state of Indiana. Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value as compared with the general line of the road does not prove that the board did not take those peculiar matters into consideration. On the contrary the reasonable presumption is that if its attention was called by the company to those facts it did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company. Indeed, its certificate is affirmatively that it took into consideration 'all other matters appertaining thereto that would assist the board in arriving at a true cash value' of the parts of the road within the state of Indiana. That the aggregate value of the entire property of the company was evidence properly receivable and bearing upon the question of value of that part in Indiana is a proposition which, as we have heretofore said, is clearly established both in reason and authority. * * * Is testimony that the value placed by the board was excessive, together with testimony that portions of the road outside of the state were of largely greater value than any similar length of road within the state, unaccompanied with evidence that the board reached the valuation by smply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration the fact of such excessive value of portions outside of the state sufficient to impeach the determination? This question must be answered in the negative."

338 The later case of W. U. Telegraph Co. v. Taggart, 163 U. S. 1, involved an amendment to the statute involved in those two cases, providing for the taxation of telegraph and other companies. It expressly provided for an apportionment of the gross value on a mileage basis and said nothing whatever as to taking same into consideration. But the State Supreme Court and the Supreme Court of the United States following it held that it should be construed in connection with the original act and that so construing it such was its meaning. Mr. Justice Gray there said:

"This Court, at the last term, in several cases affirming judgments of the Supreme Court of Indiana, held that the statute of 1891 did not, in the case of a railroad partly in that state and partly in another, require that the value of the part in Indiana should be determined absolutely by dividing the whole value upon a mileage basis; but only that the total amount of stock and indebtedness should be taken into consideration in ascertaining the value."

He quoted with approval from the opinion in the State Supreme Court the following portions thereof, to-wit:

"The act, it is true, 'provides a method of valuation, mileage method, as a basis for the taxation of certain property within the state of Indiana. But this is simply a means for determining the true

cash value of the property within the state; and if in the case of appellant's property or in any other case, it is shown to the board, or is discovered by them, that still further deductions should be made, on account of larger proportionate values outside of the state, or for any other reason, then the board must make such deductions, so that, finally, only the property within the state of Indiana shall be assessed and that at its true cash value."

339 And again:

"Construing the acts of 1891 and 1893 together it will, therefore, be presumed, in the absence of evidence to the contrary, that the state board has deducted from the total valuation of all interstate property, such values, if any, of intra-state property as will leave the remaining property, within and without the state, as near as may be of equal value. * * * The act of 1893 provides, generally, for a mode of assessing the true cash value of that part of interstate telegraph and other property which is within the state of Indiana, to-wit, the mileage method. But should there be particular cases where that method must be modified in order to reach the necessary result, namely, the true cash value of such part of the property as is within the jurisdiction of the state, the law of 1893 itself supplies the means of doing so."

He then said:

"The statute of Indiana of 1893 regarding telegraph companies, therefore, as construed and applied by the Supreme Court of the state, like the statute of 1891 regarding railroad companies while it takes as the basis of valuation of the company's property within the state the proportion of the value of its whole capital stock which the length of its line within the state bears to the whole length of all its lines makes it the duty of the state board of tax commissioners to make such deductions on account of a greater proportional value of the company's property outside of the state or for any other reason as to assess its property within the state at its true cash value only."

If then such was the object in part of the amendment it would seem that it was its object also to make it so that, in a case where that part of the capital stock of such a company in this state is proportionately of more value than the part elsewhere, by reason of some

340 special circumstance, the statute would require the board to include in its assessment the whole of the excess value in this state. The inclusion of the whole of the excess value in this state can be brought about in either of two ways also. The mileage proportion in this state of the capital stock would include that proportion of such excess value. The mileage proportion elsewhere of such excess value could then be added thereto. This would make the assessment include the whole of the excess value. Or the whole excess value in this state can first be deducted from the value of the capital stock, then a part of the remainder can be apportioned to this state on the mileage basis, and then the whole of such excess value can be added thereto. The result obtained in this way will be exactly the same as that obtained in the other, and it is, therefore, immaterial which of the two ways is adopted.

Of course in order to make a deduction or addition on account of

such excess value, as the case may be, the amount thereof has to be determined. If the excess is in the tangible property it has to be determined wherein it lies, i. e. whether in terminal facilities, rolling stock or in something else, and what the extent of it is, and then the value thereof has to be determined. Cost of construction or acquisition and extent of deterioration are no doubt considerations relevant to such determination. No other way of determining the amount of such excess value, in such a case, occurs to me. Of course under our complicated system of assessing interstate railroad companies, in such a case, if the excess is in this state, it is in fact assessed by the railroad commission. But, if I mistake not, the Board of Valuation and Assessment, in as much as it deducts the assessed value of the tangible property in this state from the value
341 of the part of the capital stock therein, would have to take it into consideration to keep from deducting it from the franchise. So, there occurs to me but one way of determining the amount of the excess value if it is in the intangible property. That is to determine the Kentucky gross receipts and the elsewhere gross receipts and then to compare them. It is from such a comparison that it is to be determined whether there is any such excess value, where it is and its amount. It seems to me that it is in such comparison, rather than in a comparison of the respective net incomes, that the truth is to be found, though as to this I may be mistaken. I cannot see anything to be gained by considering both comparative gross receipts and comparative net incomes and averaging them. Such procedure does not seem to me to have relation to the truth of things. The proper division of the gross receipts between this state and elsewhere in order to the comparison of their respective parts calls for much thought but the necessities of this case do not require that I should give expression to any opinion which I may have in regard thereto.

My conclusion, therefore, is that the statute does not require the board to absolutely, i. e. in all cases, *to* allot the mileage proportion of the value of the capital stock to this state as the value of that part thereof therein and to fix the remainder left after deducting therefrom the assessed value of the tangible property in this state as the value of the franchise therein. It is elastic enough to permit of a deduction from or addition to such mileage proportion in case there is excess value elsewhere or in this state on account of it, so as to keep from taxing any part thereof in this state,
342 if it is elsewhere, and to tax the whole of it if it is within this state.

If this view of the statute is correct it follows therefrom that the board did not depart therefrom in that it allotted to this state more than the mileage proportion of plaintiff's capital stock and fixed the remainder left, after deducting therefrom the assessed value of its tangible property in this state as the value of its franchise therein, unless the part of plaintiff's capital stock in this state was proportionately of the same value as the part elsewhere or proportionately less than the value thereof. It is defendants' claim that the part of plaintiff's capital stock in this state is proportionately of

more value than the part elsewhere and I propose to dispose of this case on the assumption that this claim is correct.

(5) If then the board departed from the statute in the method which it pursued it so did in some particular not indicated by plaintiff and not thus far considered. But I feel constrained to hold that it did depart therefrom in that it did not care for the excess value in this state in the way in which I have indicated that it could have cared for it. If I am correct in the view that such is the only way in which to care for it, of course, the statute contemplates that it shall be so cared for and in no other way. The way in which the board attempted to care for it was by changing what defendants term the apportioning unit. It changed it from the mileage proportion to the average of the three proportions, to-wit, the mileage proportion, the gross receipts proportion and the net income proportion. The only proportions available other than the mileage proportion are the gross receipts proportion, the net income proportion, the average of the two, the average of either and
343 the mileage proportion, and the average of the three proportions. But neither the gross receipts proportion, nor the net income proportion, nor the average of the two will do for neither has any true relation to the apportionment of the tangible property. So far as either has any relation to the apportionment of the capital stock it is to the intangible part thereof and of the three it is only the gross receipts proportion or the net income proportion that can be said to have such relation thereto, of which two it seems to me the gross receipts proportion is to be preferred. Even as to intangible property no instance of an apportionment of such property on a gross receipts basis has come to my notice. The case of Erie R. Co. v. Pennsylvania, 21 Wall. 492, involving a tax on the gross receipts in Pennsylvania of an interstate railroad company, which was upheld. There the apportionment of the gross receipts was on a mileage basis. The statute itself contained no provision for an apportionment. It merely provided for a tax on the gross receipts in the state of all railroad companies operating therein and the assessing board determined the amount of the gross receipts in the state of the company there involved by so apportioning them. The case indicates how little an assessing board is dependent on legislation to provide the method by which it shall value the property subject to its assessment. If then the excess value is in the tangible property alone it is impossible by the use of the gross receipts proportion, or the net income proportion or the average of the two to determine its existence or its amount. And if it is in the intangible property, an apportionment of a part of the value of the capital stock on such
a basis will apportion both the intangible property and the
344 tangible property and whilst the apportionment of the one may be correct that of the other, presumptively at least, will not be. Possibly there may be a certain degree of sympathy between the intangible and tangible property and such as to weaken the presumption, nothing else appearing, that the two parts of the tangible property are proportionately of the same value, but certainly not sufficient to overcome it. An indication of how little

sympathy may exist between the two is to be found in the Massachusetts Western Union Telegraph Company case. There the intangible property in that state was treated as being as much more proportionately than the part elsewhere as the part of the tangible property therein was less than the part elsewhere, so as to justify the Court in upholding an apportionment of both on a mileage basis.

If then neither the use of the gross receipts proportion nor of the net income proportion, nor of the average of the two will yield a correct result, the use of the average of the gross receipts proportion or the net income proportion and the mileage proportion or the average of the three proportions will not do so. Possibly the use of the average of the gross receipts proportion or of the net income proportion and the mileage proportion may yield a truer result than the use of the gross receipts proportion or of the net income proportion by itself, will do, but it will still come short of the truth. The use of the average of the three proportions, thereby as it were doubling up on the mileage proportion, is farther away from the truth than the use of the average of either the gross receipts proportion or the net income proportion and the mileage proportion. The ideas intended to be conveyed here can be made clearer if I apply them to a supposed state of case. That case is
345 that the value of plaintiff's capital stock is $225,000,000
made up of tangible property of the value of..... $175,000,000
and intangible property of the value of..... 50,000,000.

The mileage proportion thereof is $56,500,000. But this is not the true value of the part of plaintiff's capital stock in this state if the gross receipts proportion is 39 per cent and the net income proportion is 41 per cent as determined by the board. On the one basis the true value thereof is as follows, to-wit:

25 per cent of the tangible property.....	$43,750,000
39 per cent of the intangible property.....	19,500,000
Total value of the part in this state.....	$63,250,000

or $6,750,000 in excess of the mileage proportion. On the other basis it is as follows, to-wit:

25 per cent of the tangible property.....	$43,750,000
41 per cent of the intangible property.....	20,500,000
Total value of the part in this state.....	$64,250,000

or $7,750,000 in excess of the mileage proportion. The gross receipts proportion of the value of the capital stock is $87,750,000 or $24,500,000 in excess of the true value of the part of the capital stock in this state according to the one calculation and $23,500,000 in excess thereof according to the other.

The net income proportion of the value of the capital stock is $92,500,000 or $29,000,000 in excess of the true value of the part

of the capital stock in this state, according to the one calculation and $28,000,000 in excess thereof according to the other.

346 The average proportion of the gross receipts proportion and the mileage proportion, which is 32 per cent of the value of the capital stock, is $72,000,000 or $8,750,000 in excess of the true value of the part of the capital stock in this state according to the one calculation and $7,750,000 according to the other.

The average proportion of the net income proportion and the mileage proportion, which is 33 per cent of the value of the capital stock, is $74,250,000 or $11,000,000 in excess of the true value of the part of the capital stock in this state according to the one calculation and $10,000,000 according to the other.

The average proportion of the three proportions, which is 35 per cent and which is the proportion used by the board, is $78,750,000 or $16,500,000 in excess of the true value of the part of the capital stock in this state according to the one calculation and $15,500,000 according to the other.

If then the supposed case is the true one and the line of reasoning here followed is sound the board has assessed as against plaintiff according to the one calculation $16,500,000 and according to the other $15,500,000 of property not in this state. Of course, the extent of the assessment of property elsewhere would be reduced if the value of the part of the tangible property in this state is proportionately more than the value of the part thereof elsewhere, which it is not unlikely is the case. And in justice to myself it should be noted that in adopting this line of reasoning I have been without the assistance of the reflections of others. This is the first instance, so far as I am advised, in which the position has been taken that the part of such a property unit as is involved here covered by

347 the assessment attacked is proportionately of more value than the part elsewhere and an attempt has been made to have the assessment include the excess value. I am without any assistance from counsel because plaintiff's counsel claim that the allotment should have been limited to the mileage proportion and defendant's that it was right to use the average proportion of the three in making it, both of whom I have been constrained to hold are in error.

The use of the average proportion of the three is excluded by the statute itself. What it says shall be considered is not the mileage proportion, i. e., the proportion of Kentucky mileage to the total mileage, but the mileage proportion of the value of the capital stock. What the board considered was the one and not the other. It considered the mileage proportion in averaging it with the gross receipts proportion and the net income proportion. But a consideration of the mileage proportion is not a consideration of the mileage proportion of the value of the capital stock. Had it considered the latter it would have apportioned to this state the mileage proportion of the value of the capital stock and then made an addition thereto on account of the excess value in this state in order to allot to this state the full value of the part of the capital stock in this state. Had it first made such an apportionment it could not have made such an allotment otherwise than by making such an addition. Instead of so

doing it considered the mileage proportion in and of itself by averaging it with the other two proportions and then left it for good and apportioned to this state the average proportion of the value of the capital stock as the value of the part in this state. Such I
348 maintain was not a consideration of the mileage proportion of the value of the capital stock. The distinction here attempted to be made may be a nice one, but it seems to me that it is a true one.

In another view of the matter the statute excludes the use of such an average proportion. It certainly so did before the amendment of June 9, 1893. The allotment then was limited to the mileage proportion of the value of the capital stock. The sole object of the amendment was to make it so that it should not be so limited. This is accomplished by providing that such mileage proportion should be considered in fixing, instead of should, less the assessed value of the tangible property, be value of the franchise. It is a well known rule of interpretation that the mention of one thing excludes another thing of like character. This is particularly so here where no substitution of an apportioning unit is needed in order to accomplish the object of the statute, which is to have the assessment include no part of the capital stock elsewhere and all of it in this state and where another portion of the statute, to-wit; section 4080, mentions another apportioning unit, to-wit; the gross receipts proportion. The original method provided for in that section is subject to the criticism that it required the apportionment of the tangible as well as the intangible property of the companies covered by it on the gross receipts basis. It seems not to have worked well in practice and because of this the alternative method was provided, by which an apportionment was abandoned and the part of the capital stock in this state was treated as an independent whole. It was a backward step to so construe the statute as to compel the use of both methods. In the case of such companies, inasmuch as they do not operate and conduct their business along definite and fixed
349 lines, the gross receipts belonging to this state and those belonging elsewhere can be readily determined, which is not the case as to those covered by section 4081. Besides no express provision was made for companies covered by section 4081 making such a showing as would enable an apportionment as to them being made on such a basis. I have already alluded to a consideration for limiting the second sentence of section 4079 providing for the making of such a showing to the companies covered by section 4080. An additional consideration makes it conclusive that it should be so limited. That sentence was in the original act the same as it is now. At that time section 4081 provided that the apportionment should be absolutely on the mileage basis. It, therefore, served no purpose as to such companies and could not have been applicable to them. Finally, as already noted, the Indiana statute involved in the Railroad & Telegraph Companies cases is substantially the same as section 4081 after the amendment of June 9, 1893, in providing that in making the assessment an apportionment of the capital stock on a mileage basis shall be considered. Yet in neither one of those cases

is there the slightest intimation that an excess value elsewhere can be cared for by an apportionment on any other basis than the mileage basis. They recognize that the apportionment on the mileage basis is the basis of the assessment and that the excess value elsewhere is to be cared for by a deduction therefrom.

The defendants rely on certain expressions in the opinion in
350 the Southern Pacific Railroad Company case and in the case of Commonwealth v. U. S. Express Co., 149 Ky. 759. In the former case Judge Hobson said:

"The statute does not provide that the proportion between the lines in this state and the lines in and out of this state, shall be conclusive. It simply provides that this fact shall be considered by the board. The relative length of the lines in and out of this state would throw much light on the value of the franchise exercised in this state; but there might be other facts throwing light on the question."

In the other case Judge Carroll said:

"We do not think that the mileage basis is exclusive, or, that, in every case, this method should be resorted to in ascertaining the value of the franchise of a common carrier. The statute does not confine either the state board or the Courts to the mileage basis, but leaves them at liberty to adopt any other basis within statutory limits that will aid in reaching a fair valuation. A state of case might be presented in which it would be unjust to the Commonwealth to fix the value of a franchise on the mileage basis alone, but under the facts in this record, we think the Court did not err in arriving at the value of the franchise on this basis."

Each of these statements is a dictum and the latter shows on its face that it is such for there the apportionment was not only on a mileage basis, but such apportionment less the assessed value of the tangible property was fixed as the value of the franchise. As to the statement of Judge Hobson, I have no criticism to make of it. I said as much in the case of Louisville & Nashville Railroad Co. v. Coulter, 131 Fed. 282, 305 when I said:

"The amendment was, no doubt passed, in order that the
351 board should not be bound absolutely to accept such proportion of the cash value of the entire property as the value of the part in this state, and might be at liberty, in determining the value of such part, to consider the difference in character and value, if any, between the mileage in and out of the state."

And I have said nothing herein that is in conflict with this statement of Judge Hobson. What I have said is that the apportionment on the mileage basis is not conclusive, i. e., absolutely determinative of the value of the franchise. I have said also that it is not wholly exclusive. My position is that it is exclusive of any other method of apportionment, but it is not exclusive of deducting from or adding to the part so apportioned if there is an excess value elsewhere or in this state so that by using the mileage basis of apportionment as the basis of the assessment property elsewhere will not be taxed in this state and none of the property therein will escape taxation therein. The statement of Judge Carroll is broader and possibly goes the

length of saying that it is not even necessary that there should be an apportionment on any basis. This, of course, if intended, cannot be sound in the face of the statute providing that an apportionment on the mileage basis shall be considered. What was said was under the misapprehension that if the mileage basis be held exclusive of any other basis of apportionment the amount so apportioned would be conclusive of the value of the franchise so that if it were really of more value such excess value could not be assessed. But, as we have seen, such is not the case.

I am, therefore, driven to hold that the board did not follow the statute in making an apportionment on any other basis than
352 the mileage basis. If its position that the value of the part of plaintiff's stock in this state was more than the mileage proportion was sound, it should have apportioned a part thereof to this state on the mileage basis and then cared for the excess value in this state by an addition to such mileage proportion. The board in taking the position that the part of plaintiff's capital stock in this state was proportionately of more value than the part elsewhere and in undertaking to care for the excess value in this state was dealing with a delicate matter. This was so because there was a question of jurisdiction involved. Its valuation was not limited to property in this state. It covered interstate property and its determination was not limited to a mere valuation. It included a finding as to how much of such interstate property was in this state. Had it proceeded along right lines its conclusion as to how much of plaintiff's capital stock was in this state, however it may have been as to its value, would have been presumptively correct only. It would not have had the binding force as to the valuation of property admittedly within its jurisdiction. But it did not proceed along right lines and its assessment must, therefore, be held void.

(6) Though the fact that I have come to this conclusion might relieve me of the necessity of considering whether the assessment is void on the other two grounds relied on I have deemed it important that I should reach conclusions regarding them also and that I should make such conclusions known. I, therefore, proceed with the case. And it is next in order to dispose of the plaintiff's claim that the board did not follow the statute in the matter of the hear-
353 ing prescribed thereby. The provision in relation thereto is section 4083, which is in these words:

"It shall be the duty, of the auditor immediately after fixing such value by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence and the chairman of the board is hereby authorized to summons and swear witnesses and after hearing such evidence the board may change such valuation as it may deem proper, and the action of the board shall be final."

The claim is not that the board did not give plaintiff notice that it had made a preliminary assessment of its franchise and give it an opportunity to appear before it and be heard. It did give such notice and plaintiff appeared before it and presented evidence and

made arguments in regard to the matter. The claim is that the board failed to inform it as to the method by which it had reached such assessment, and without its knowledge used a report of the railroad commission in reaching the conclusion which it came to and that by reason thereof it had not opportunity to be heard as to those matters and hence was denied such hearing as the statute contemplates.

It is well settled that the assessment of property for taxation is a judicial function and that the taxpayer is entitled to be heard in regard thereto before his property is assessed. But this right to a hearing does not involve a right to know in advance of the assessment the amount at which the assessor thinks the property should be assessed and hence as to the method by which he has
354 reached such amount. Ordinarily in judicial proceedings against one he is entitled to know specifically what is the charge against him. But this is not so as to the assessment of property for taxation. It is sufficient that the taxpayer has notice that his property is about to be assessed and that he is given full opportunity to be heard as to the amount at which he thinks it should be assessed. And this notice need not be other than a statutory provision fixing the time and place when the assessment is to be made. This has been held to be true as to the assessment of such property as is involved here as well as to the assessment of the real or personal estate of the ordinary taxpayer.

In the Pittsburg C. C. & St. L. R. R. Company case Mr. Justice Brewer said:

"It is contended specifically that the act fails of due process of law respecting the assessment in that it does not require notice by the state board at any time before the assessments are made final, and several authorities are cited in support of the proposition that it is essential to the validity of any proceeding by which the property of the individual is taken that notice must be given at some time and in some form, before the final adjudication. But the difficulty with his argument is that it has no foundation in fact. The statute names the time and place for the meeting of the assessing board and that is sufficient in tax proceedings; personal notice is unnecessary. In state railroad tax cases 92 U. S. are these words, which are also quoted with approval in the Kentucky Railroad Tax cases:

" 'This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and, in the business of assessing taxes, this is all that can be reasonably asked.' "

355 Again he said:

"It is urged that the valuation as fixed was not announced until shortly before the adjournment of the board, and that no notice was given of such valuation in time to take any steps for the correction of errors therein. If by this we are to understand counsel as claiming that there must be notice and a hearing after the determination by the assessing board, as well as before, we are unable to concur with that view. A hearing before judgment, with full

opportunity to present all the evidence and arguments which the party deems important is all that can be adjudged vital."

But possibly in view of the fact that such an assessment involves a question of jurisdiction a different rule should prevail as to it. If then this position is sound due process of law, therefore, did not require that plaintiff should in advance of the assessment of its franchise in this state be advised of the amount at which the board had concluded it should be assessed or of the method and the various steps therein by which it had come to such conclusion. But, though due process of law did not so require, the legislature had power to require that he should have notice thereof. And if it has so provided by section 4083 the giving of such notice was essential to the validity of the assessment. I do not think that there is any dispute as to this. Nor is there any dispute that such notice was not given. The board's records contains this minute in regard to plaintiff's assessment, to-wit:

"It is resolved by the Board of Valuation and Assessment of Kentucky, after having given full and due consideration to the returns to the auditor made by the Louisville & Nashville Railroad Company, a corporation under the laws of Kentucky, and,
356 having taken into consideration the gross and net earnings of said company in Kentucky and elsewhere, and having considered the proportion and length of the lines owned, operated, leased or controlled by said company in Kentucky bears to the total length of the lines owned, operated, leased or controlled in this state or elsewhere; and having considered the value of its shares and the market value thereof and the amount of its bonded debt; and having considered the amount of its surplus fund and undivided profits and the value of all other taxable assets of said company; and after having heard and considered all before the board including the evidence of the witnesses introduced by the company and the exhibits filed therewith; and after having heard and considered the arguments of counsel for the company and after said board had ascertained the value of the capital stock of said company in Kentucky, and, from the amount thus found did deduct the assessed value of all tangible property assessed in the state of Kentucky, it is the judgment of said board, all the members thereof concurring therein, that the taxable value of the franchise of said company exercised in Kentucky as so determined is $45,428,074.00; and the board does hereby ascertain and fix the value thereof at said sum or amount for the purpose of taxation and assessment in Kentucky for the year 1912.

"August 31, 1912, the foregoing resolution *was* offered by H. M. Bosworth, was seconded by Thomas S. Rhea. Upon call of the roll of the members on the resolution; Bosworth voted 'Yes'; Crecelius voted 'Yes'; Rhea voted 'Yes.' The chairman declared the resolution carried and ordered that same be recorded."

The secretary of the board states in his affidavit that this minute "embodies the acts of the board in making said assessment" and the members of the board in their affidavits state that "it is a true and correct record of the judgment and findings of said board." It

is to be taken, therefore, that this minute is the only minute on the records of the board in relation to the assessment. This
357 minute relates to the board's final assessment. The board's records contain no minute in relation to the preliminary assessment and hence gives no information whatever in regard thereto. All that is known in regard thereto is to be obtained from the notice which the board gave of the preliminary assessment. It is in these words and figures, towit:

"State of Kentucky,
Office of Auditor of Public Accounts.

FRANKFORT, KY., April 12, 1912.

To Louisville & Nashville Railroad Company, Ninth and Broadway, Louisville, Ky.:

The State Board of Valuation and Assessment have had the report of the above corporation for June 30, 1911, for the taxes of 1912, under consideration and have assessed the value of your franchise as follows:

Capital stock	$81,670,377
Less amount of tangible property assessed by assessor for state taxes	29,170,377
Value of franchise	$52,500,000
Tax at 50 cents on each $100	$262,500.00

Under the law you will have thirty days in which to appear before the board, introduce evidence, and ask for a change in the assessment. Should the thirty days expire without a protest, this assessment becomes final.

Yours truly,

H. M. BOSWORTH, *Auditor.*

Make checks payable to treasurer but mail to this office."

The words "capital stock" in the notice *is* vague in that it is not stated whether what is meant is the entire capital stock or the part apportioned to this state. But there is no question that it was the latter that was meant and that it was so understood. The only
358 information then which the notice contained as to the method by which the assessment had been reached was as to the part of the entire property allotted to this state and the amount deducted therefrom on account of the tangible property therein. It contained no information whatever as to the amount at which the entire property had been valued, nor as to the basis on which a part thereof had been so allotted. Thereafter the plaintiff appeared before the board and asked a change in the assessment, introduced evidence and argued the matter. But after receipt of the notice and before appearing the plaintiff in writing requested the auditor to furnish it a statement

"showing the principle on which the board proceeded or the mode or manner employed by it of estimating the value of this company's franchise." In answer to this request the auditor wrote to plaintiff as follows, to-wit:

"In response to your request that I furnish you by return mail with a statement showing the principle on which the board proceeded or the mode or manner employed by it of estimating the value of the company's franchise, I beg to advise you that as a member of the board making the assessment I was guided by the statutes of Kentucky, under which we were proceeding in making the assessment and the several opinions of the Court of Appeals of Kentucky which have construed those statutes, and the evidence before the board in arriving at my conclusion and forming my judgment as to the value of this property for assessment purposes. The board had before it, when the assessment was made, several reports made by the officers of the company to the auditor of Kentucky and the annual report of the company to its stockholders for the year ending June 30, 1911. If it is made to appear upon a hearing before the board the tentative assessment is erroneous or incorrect, as a member of that board, I will urge that it take such action as will in my judgment do
359 complete justice to the company and the state of Kentucky alike. I do not know of any statutory provision that requires the board to submit its calculations to the company in advance of a hearing or at all."

At the hearing the plaintiff introduced the auditor, chairman of the board, as a witness and asked him a series of questions, answers to which would have elicited the valuation which the board had fixed on the whole property and the method by which it had arrived at such valuation and the basis on which the part of such valuation was allotted to this state and he declined to answer each one of these questions on the advice of the attorney general. It is clear, therefore, that, in advance of the final assessment no notice was given to plaintiff of the method by which it had reached the preliminary assessment and the various steps therein save in so far as the notice thereof contained such information, and it came short of notifying plaintiff whether or not the whole property had been valued and a part allotted to this state, and if so, at what it had been valued and the basis on which it had been allotted. The minute in relation to the final assessment contains no statement as to these matters. The sole information as to that assessment which it contains is that in making it the value of the entire property in this state was ascertained and the assessed value of the tangible property therein deducted therefrom and in the notice thereof it was shown that in making it the value of the entire property in Kentucky was changed from $81,670,377 in the preliminary assessment to $74,598,451, thereby changing the assessment of the intangible property in this state from $52,500,000 in the preliminary assessment to $45,428,074.
360 So I take it that there is not any dispute in this case that plaintiff did not receive the notice heretofore stated, and in that it did not receive such notice, it claims that it did not have the hearing contemplated by the statute. The sole dispute here is as to

whether the board was bound to give such notice. The defendants claim that it was not. According to its position it was not bound to give even as much information as was given by the notices of the preliminary and final assessments. It was sufficient for it to give notice of the amount at which the plaintiff's franchise had been assessed without more. The plaintiff on the other hand contends that it was entitled to notice of the method by which that assessment had been reached and the different steps in it. On this point I have not the slightest doubt that the plaintiff is in the right. I am satisfied not only that it was entitled to notice thereof but that it was the duty of the board to enter on its records the preliminary assessment showing the different steps in the method pursued by it in making it and that they resulted in such valuation, and such changes therein as were made in the final assessment and that they resulted in the valuation finally fixed, so that an inspection of its records would give full information in regard to such matters. As it is the board made no record whatever of its preliminary assessment and in the record of the final assessment nothing is set forth except the final result of whatever method was adopted. In the Fargo case, it was held, as heretofore stated, that certain stocks and bonds owned by the Express Company were not used by it in its business and hence constituted no part of the unit a part of which was in Indiana and as-
361 sessable there. Mr. Justice Holmes in disposing of the case considered whether as a matter of fact the taxing board had included those stocks and bonds in the assessment of the entire property a part of which had been apportioned to that state on the mileage basis. It was essential that they had been in order to overthrow the assessment. The main evidence which he relied on as showing that they had been was that the minutes of the board did not show that they had been deducted. He said:

"We may add that it appears by a stipulation as to facts that 'the minutes of said state board of tax commissioners' are in evidence. This means the complete minutes. It must be assumed that the minutes show all that took place in the proceedings and therefore, that we have before us all the evidence that was put in as well as a report of what was said."

There could have been but one basis for the assumption that the minutes showed all that had taken place in the proceedings and that was that they should have shown it. It was the duty of the board to enter of record its proceedings in full. He noted that the company proceeded before the board on the idea that it had or was going to include them in the valuation and said:

"If the company had been mistaken common fairness required that it should be informed and allowed to give further evidence of the undoubted truth."

And finally he said that there was

"no alternative open and no other could be pressed consistently with the candor to be expected from the officers of a state, in face of a constitutional question and dealing with great affairs."

362 There is nothing in the case of Chicago B. & Q. R. R. Co.

v. Babcock, 204 U. S., 585, against this position. The question there raised was whether after the assessment had been made, the companies in a suit impeaching the assessment had a right to put the members of the board on the witness stand and examine them "with regard to the operation of their minds in valuing and taxing the roads." It was held that they had not the right to do so. And one of the reasons which led Mr. Justice Holmes to this conclusion is thus set forth by him:

"Again this board necessarily kept and evidently was expected by the statutes to keep a record. That was the best evidence, at least of its decisions and acts. If the roads had wished an express ruling of the board upon the deductions which they demanded, they could have asked for it, and could have asked to have the action of the board or its refusal to act noted in the record."

This reasoning against the right to put the members of the board on the stand after it had completed its work and inquire into the operation of their minds is that the companies instead of so doing should go to the records of the board where they ought to be able to find all that they ought reasonably to know and if they did not contain all they wanted to know they had themselves only to blame for the fact that they did not. It was in their power in the course of the work of the board to make the records full and complete. A decision that the members of the board cannot be quizzed after they have completed their work as to the operation of their minds in doing it is not against the position that their records should exhibit in full the various steps in their work. And the reason given why
363 they should not be so quizzed is, in effect, that their records should contain such steps which was all that the company was entitled to know.

The position of the board and of the defendants herein is that all that was essential to the validity of their work was that the company before it was finally assessed should have notice of the automatic result of the taking of the various steps in the method applicable to it and that its record should show that result as affected by the changes made in it after hearing the plaintiff constituting the final assessment. The board had nothing whatever to do directly with such result. It was the creature of the statute. In the case of each method, as we have seen, the statute prescribed certain specific steps to be taken by the board, the taking of which will result automatically in the assessment of the franchise in this state. This is less apparent as to the method involved here than the others. Section 4081 only mentions expressly the first two steps, to-wit, the valuation of the capital stock and the apportionment of a part of the value thereof to this state on a mileage basis, but the other two, to-wit, the deduction from or the addition to this part, as the case may be, on account of any excess value by reason of a special circumstance, if any there be, and the deduction of the assessed value of the tangible property in this state are implied and as really prescribed as the two which are expressed. The statute provides that the board shall take these various steps, i. e., shall reach conclusions first as to the value of the capital stock and then as to how much thereof is in this

state, which involves a determination whether as much as and no more than the mileage proportion thereof is therein and, if
364 it is determined either that not as much as or more than such mileage proportion, how much less or more, and that it shall after so determining how much of the capital stock is in this state, deduct therefrom the assessed value of the tangible property therein and that the result thereof shall be the value of the franchise in this state. Yet it is contended that the board has the right to keep to itself these weighty conclusions which the statute requires it to reach, on the correct determination of which depends the question whether the board has exceeded its jurisdiction or exhausted its full power, which it could keep only as long as its members remembered them and in view of the extent of its work, not very long, if for any length of time, and make no entry thereof on its records or give any notice in regard thereto, and that all that was required was that it should enter of record and give notice of the automatic result of its work. The mere statement of this position is sufficient to condemn it. It is inconceivable that the legislature had any such idea. Had it had any such idea it would never have provided for a preliminary assessment and notice thereof to the company so that it might appear before it and point out any errors that the board might have fallen into in the operation of a complicated piece of machinery. It would have contented itself with a provision fixing the time and place for making the assessment at which the companies might appear and introduce such evidence and present such arguments as they saw fit without more.

The Court of Appeals in the two American Surety Company cases held that if the board in making an assessment does not follow the method prescribed by the statute the assessment is void. If
365 such is the case then the company to be affected thereby is entitled to know that method, so that if the method or any step in it is wrong, it can have the preliminary assessment corrected by the board in the final assessment, and, if it cannot succeed in so doing may appeal to the Courts to overthrow it.

The necessities of this case do not require that I should determine whether if the board had supplied plaintiff with full information as to the steps taken by it the assessment would be invalid because the records of the board do not show the conclusions which it reached concerning those matters as to which the statute required it to reach conclusions. It is sufficient to say that plaintiff was entitled to notice thereof. And that the failure to give such notice is an additional reason for holding the assessment void.

(7) I am clear also that the board did not have the right to use plaintiff's report to the Railroad Commission without its being notified thereof and given an opportunity to be heard in regard to the matters therein relied on as affecting the assessment. It was from items in that report, in connection with items in plaintiff's report to its stockholders that the board was enabled to determine the gross receipts proportion and the net income proportion which it averaged with the mileage proportion thereby obtaining the percentage which it used in apportioning a part of plaintiff's capital stock to this

state. Without those items it would have been unable to make such apportionment and would have been limited to the mileage proportion. By means thereof it was enabled to raise the apportionment 10 per cent and thereby add possibly as much as $25,000,000 to plaintiff's assessment. This it did without an opportunity on
366 plaintiff's part to say one word in regard to it. An authority in support of plaintiff's position that it was entitled to know of the contemplated use of this report and to an opportunity to be heard in regard thereto is the case of Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S., 88. Mr. Justice Lamar there said:

"The government further insists that the Commerce Act requires the commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created and having been given legislative power to make rates it can act as could Congress, on such information, and, therefore, its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing for manifestly there is no hearing where the party does not know what evidence is offered or considered and is not given an opportunity to test, explain or refute."

And again he said:

"The commission is an administrative body, and even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to admissibility of evidence which prevails in suits between private parties. But the more liberal the practice in admitting testimony the more imperative the obligation to preserve the essential rules of evidence by which rights are awarded or defended. In such cases the commissioners cannot act on their own information as could jurors in primitive days. All parties must be apprised of the evidence submitted or to be considered and must be given an opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense."

367 The fact that it was plaintiff's own report which was used does not make a difference. Whilst plaintiff can hardly be heard to say that its own statement is not true, it can be heard to say in what sense it intended the statement to be taken as true. It was not made for assessment purposes or to enable any one to form a judgment as to the gross receipts or net income proportions of the plaintiff. According to the affidavit of plaintiff's comptroller the items therein relied on were made for comparative purposes only, i. e., to compare one year with another and otherwise they were arbitrary in character. A consideration of all he says in regard thereto suggests the possibility at least that plaintiff has been done an injustice in the use which the board made of those items. The plaintiff had the right to make this explanation to the board and it is not to be presumed that it would not have given it whatever weight it is entitled to.

(8) Finally I come to plaintiff's claim that the assessment is void because in violation of the Fourteenth Amendment.

The defendants make a preliminary contention here as they have done against the consideration of the merits of this suit. This preliminary contention is that the assessment made by the board is not the action of the state and hence cannot be in violation of the Fourteenth Amendment, the applicable clause whereof is in these words:

"Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

368 They argue that if a suit against state officers to enjoin them from taking action which they threaten to take in the name and for the state, under color of their office, as this is, is not a suit against the state, as I have held, then the action of the board in making the assessment complained of in the name and for the state under color of its office is not action on the part of the state and hence not prohibited by the Fourteenth Amendment even though it may deny plaintiff the equal protection of the laws. And they cite and rely on the decision of the Supreme Court in the case of Barney v. New York, 193 U. S. 430. That was a suit begun in the Federal Court. As there was no diversity of citizenship between the parties thereto jurisdiction depended solely on the question whether the action complained of therein was a violation of the Fourteenth Amendment and hence arose under the Federal Constitution. The plaintiff in the suit was an abutting lot owner and the action of which he complained was the construction of a rapid transit tunnel under a city street, so as to obstruct the easement of access to his lot, without compensation therefor, under the authority of the Board of Rapid Transit Railroad Commissioners for the city of New York. The theory on which the plaintiff proceeded was that such action was not only unauthorized but was forbidden by state legislation. It was held that the Federal Court in which it was brought was without jurisdiction because the action of the board under whose authority the tunnel was being constructed was not the action of the state and hence not in violation of the Fourteenth Amendment and the suit, therefore, did not arise under the Federal Constitution, and it was dismissed on this ground. The case

369 was disposed of on the assumption that the Board of Rapid Transit Railroad Commissioners for the city of New York were state officers or a state agency. Mr. Chief Justice Fuller said:

"The bill on its face proceeded on the theory that the construction of the easterly tunnel section was not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the Fourteenth Amendment, and the Circuit Court was right in dismissing it for want of jurisdiction."

The Chief Justice seems to have been of the opinion that in order for the action of state officers to be in violation of the Fourteenth Amendment it is essential that such action be authorized by the legislature. But a little reflection will convince one that this position is not sound and there is no inconsistency between my holding that this is not a suit against the state and further holding that the assessment complained of is in violation of the Fourteenth Amend-

ment. In the Poindexter case, heretofore referred to, Mr. Justice Matthews said:

"The distinction between the government of a state and the state itself is important and should be observed. In common speech and common apprehension they are usually regarded as identical; and as ordinarily the acts of the government are the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent and, within the sphere of the agency, a perfect representative; but outside of that it is a lawless usurpation. The constitution of the state is the limit of the authority of its government, and both government and state are subject to the supremacy of the con-
370 stitution of the United States and of the laws made in pursuance thereof, so that, while it is true in respect to the government of a state, as was said in Langford v. U. S., 101 U. S. 341, that the maxim that the king can do no wrong has no place in our system of government, yet it is also true, in respect to the state itself, that whatever wrong is attempted in its name is imputable to its government and not to the state for as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by supreme law, the constitution of the United States, is not the word or deed of the state, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name."

This, I take it, amounts to saying that the state is a political entity separate and distinct from its officers who act in its name and for it. By the government of the state nothing more is meant than its officers so acting. According to it the acts of the officers of a state are never the acts of the state unless rightful. If wrongful, though done in the name of and for the state and under the color of their offices, they are not the acts of the state in any sense, but are their own individual acts, just as much so as they would have been had they not been done in the name of and for the state and under color of their offices. It is because such is the case that a suit against state officers complaining of a past, present or threatened wrong on their part and seeking relief against them on the basis of it is never a suit against the state but a suit against the officers individually. And, in the view of the Fourteenth Amendment, wrongful acts on the part of state officers are not otherwise than the individual acts of such officers. In no sense are they the acts of the state. It is never because they are such that they come within its reach. They come within its reach because
371 the Fourteenth Amendment is leveled against them and not against rightful acts which may be said to be acts of the state. Though the letter of the Fourteenth Amendment says that "no state shall" or "nor shall any state" do so and so, that is not what is really meant. What is really meant is that the government of the state, the state officers, or state agencies, shall not do so and so. It cannot mean anything else. The state itself cannot act except in

a metaphorical sense. It is only its officers or an agency of it that can act. The Fourteenth Amendment is not a brutum fulmen or leveled against rightful action. It does not prohibit from acting that which does not act except metaphorically and then rightfully only. It prohibits from acting that which alone can act literally, to-wit, its officers, and they only when their acts will be wrongful. Hence it is directed against state officers and state agencies and is to be interpreted as if it had provided in express terms, instead of "nor shall any state" deprive or deny, nor shall any state officers or state agency deprive or deny. So interpreted it takes in any state officer or agency. There is no room to limit its sweep to any of the state government departments. It takes in every department thereof and every branch of every department. Every state officer and state agency is prohibited from depriving any person of his life, liberty or property without due process of law or denying him the equal protection of the laws and the act of such officer or agency so doing is absolutely void.

The idea intended to be here conveyed was expressed early
372 by the Supreme Court in the case of Ex parte Virginia, 100 U. S. 339. Mr. Justice Strong said therein as follows, towit:

"They (i. e., the war amendments) have reference to actions of the political body denominated a *a* state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislature, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exercised, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates constitutional inhibition; and as he acts in the name and for the state and is clothed with the state's power his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with powers to amend or evade it."

This statement is subject to but one criticism and that in so far as it says that the act of the officer who violates the Fourteenth Amendment "is that of the state." I submit that in no sense is it the act of the state. It is the individual act of the officer himself and none other. It is not necessary that it be the act of the state in order for it to be prohibited by the amendment. What it prohibits is not acts of the state but acts of state officers or agencies of the character therein described, i. e., wrongful acts on their part. Had Mr. Chief Justice Fuller had this idea clearly in mind he could not have permitted the decision in the Barney case to have the appearance of holding that the action of state officers prohibited or even not authorized by the legislature did not come within the Fourteenth Amendment.
373 He confused two entirely distinct ideas, to-wit, action in violation of the Fourteenth Amendment and action in violation of state laws. Seemingly he thought that action in violaton of the state laws could not at the same time be action in violation of the

Fourteenth Amendment. He was undoubtedly correct when he said:

"Controversies over the violation of the laws of New York are controversies to be dealt with by the Courts of the state."

And also:

"It is for State Courts to remedy acts of state officers done without the authority of or contrary to state law."

But the fact that action on the part of state officers may be in violation of state law is no reason why it may not at the same time be action in violation of the Fourteenth Amendment. If it deprives a person of his life, liberty or property without due process of law, or denies him the equal protection of the laws, it is a violation of the real intent and meaning of the Fourteenth Amendment even though at the same time it is a violation of the state law.

And he was affected by two irrelevant considerations. One was that under section 641 of the United States Revised Statutes providing for a removal from the state to the Federal Court by one who is denied or unable to enforce in the judicial tribunals of the state rights secured to him by any law providing for the equal civil rights of all persons, citizens of the United States, a defendant, in a State Court, is not entitled to removal on the ground of a denial of such
374 rights unless the denial is a legislative denial. This was finally settled in the case of Commonwealth v. Powers, 201 U. S. 1. But this removal statute is narrower than the Fourteenth Amendment. Though, as thus construed, it is so limited, the Fourteenth Amendment is not. It is not limited to any state officers or officer and, therefore, takes in every state officer or agency. The other irrelevant consideration was that a suit against a state officer for a wrongful act is not a suit against the state within the Eleventh Amendment, which consideration I have heretofore dealt with.

But he recognized that if power to act in relation to a certain matter is conferred by legislation on a state tribunal and it acts in excess of its power such action is in violation of the Fourteenth Amendment as was held in the Farmer's Loan & Trust Company case to which he alluded where confiscatory rates of transportation fixed by the Texas Railroad Commission were invalidated because in violation of the amendment. And that is just the case we have here. The Board of Valuation and Assessment has power conferred on it to assess plaintiff's intangible property and the claim is that it exceeded its power in thereby denying plaintiff the equal protection of the laws and in not following the statute. So that even if the decision in the Barney case is sound it is not against the claim of plaintiff herein that the assessment complained of is in violation of the Fourteenth Amendment. Such a consideration, however, is not essential to bring action of State Office-s within the amendment. It is essential only in the case of those who are not State officers, and it is essential as to them to constitute them a State agency.

However, it is not entirely certain that the point actually decided in the Barney case is not sound. It all depends on the question whether the Board of Rapid Transit Railroad Commissioners

375 for the city of New York, whose action was complained of were state officers or officers of the city of New York. If they were the latter and their action was not only not authorized but prohibited by state legislation then the board was not a state agency and hence its action did not come within the Fourteenth Amendment. But whatever difficulty is presented by the Barney case has been removed by two later cases, to-wit:

Raymond v. Chicago Union T. Co., 207 U. S. 20.
Home Tel. & Tel. Co. v. Los Angeles, 227 U. S. 278.

Perhaps the difficulty was not fully removed by the Chicago Union T. Co. case, but it has been by the Home Telegraph and Telephone Company case. The action complained of in the first of the two cases was exactly the same as that complained of here, to-wit, an assessment by the Board of Equalization of the intangible property of the plaintiff and it was complained of on the same ground. The Supreme Court upheld the attack on the assessment on that ground and overthrew it. In that case, however, the assessment had been made pursuant to the command of the Supreme Court of Illinois in mandamus proceedings and this circumstance gives rise to a claim that it has no application here. But in reality as the later case shows it in no wise affected the matter. The Barney case was distinguished simply on the ground that the action there complained of was forbidden by the state legislature. This was not, however, a true ground of distinction. The only possible ground of distinction is the one which I have referred to, to-wit, that the board of whose action complaint was made therein was not a state agency, but an
376 agency of the city of New York and the fact that it had been prohibited by the legislature from acting as it had had bearing on the question whether it was in fact a state agency. And in Mr. Justice Peckham's opinion therein may be found expressions which are calculated to confuse. They are expressions to the effect that action by state officers or a state agency in violation of the Fourteenth Amendment are acts of the state. As for instance referring to the assessment complained of which was held to violate the Fourteenth Amendment, he said:

"It was not the mere action of individuals, but under the facts herein detailed, it was the action of the state through the board."

I have heretofore criticised language to the same effect of Mr. Justice Strong in the Ex Parte Virginia case. I would respectfully submit that the action was the mere action of individuals and not action of the state through the board. It came within the Fourteenth Amendment, not because it was action of the state, but because what the Fourteenth Amendment in reality prohibits is not action of the state but of state officers which because of its character is wrongful and hence not the action of the state but the individual action of the state officers though in the name and for the state and under color of their offices.

The question, however, came to a head in the Home Telephone & Telegraph Company case. The action complained of in that case was an ordinance of the city of Los Angeles establishing telephone

rates which were claimed to be confiscatory. It was claimed that by reason thereof the ordinance was in violation of the Four-
377 teenth Amendment. This was the sole ground of jurisdiction as there was no diversity of citizenship and the lower Court dismissed the suit because it held that the ordinance was not in violation of the Fourteenth Amendment. The ground upon which it so held was that the enactment of the ordinance by the city council was not state action. The city council was a state agency because it had been empowered by the state legislature to fix telephone rates. And the ground upon which it was held that the ordinance was not state action though by a state agency was because the constitution of California contained a provision to the effect that no person should be deprived of his life, liberty or property without due process of law. The ordinance, therefore, on plaintiff's claim, was in violation of the state constitution and hence could not be the act of the state and as it was not state action it was not in violation of the Fourteenth Amendment. The position was taken that because of this constitutional provision not even state legislation could be in violation of the Fourteenth Amendment unless upheld by the State Courts. It is difficult to see how on this view the fact that it or such an ordinance was so upheld would make it a violation of the Fourteenth Amendment and why the position was not taken that all a state had to do to nullify the Fourteenth Amendment, so far as its limits were concerned, was to adopt in its constitution a provision in the exact terms of the Fourteenth Amendment. Thereafter no action by any state officer or officers no matter who they might be could be in violation of that amendment because their action was prohibited by the state constitution and hence was not action on the part of the state and the
378 Fourteenth Amendment is limited to state action.

But the position taken was denied and the judgment of the lower Court was reversed. It was held that on plaintiff's claim the action complained of was in violation of the Fourteenth Amendment. It was sufficient that it was the action of a state agency though in violation of the state constitution. The Barney case was dealt with by Mr. Chief Justice White, though he did not suggest the ground upon which possibly it may be upheld to which I have referred. He said:

"As to the other—the Barney case—it might suffice to say, as we have already pointed out, it was considered in the Raymond case, and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of Ex Parte Young, it is now so distinguished or qualified as not to be here authoritative or even persuasive. But on the face of the Barney case it is to be observed that however much room there may be for the contention that the facts in that case justified a different conclusion, as the doctrine which we have stated in this case was plainly recognized in the Barney case and the decision there rendered proceeded upon the hypothesis that the facts presented took the case out of the established rule, there is no ground for saying that that case is authority for overruling the settled doctrine which, abstractly at least,

it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the Barney case in so far as it might be found to conflict with the rule here applied."

That there is not the slightest inconsistency between the position heretofore taken that this is not a suit against the state and that now taken that the assessment complained of is a violation of the Fourteenth Amendment, if it denies plaintiff the equal pro-
379 tection of the laws, is made plain by the Hopkins case. That, as heretofore noted, was a suit to recover damages against a state agency for action claimed to have been taken in violation of the Fourteenth Amendment. It was brought in the State Court and carried from thence through the Supreme Court of the state to the Supreme Court of the United States. The latter Court had no jurisdiction of the case unless it contained a federal question, i. e. unless the action complained of was in violation of the Fourteenth Amendment of plaintiff's claim that it was, was not colorable. No question as to jurisdiction was raised. It was conceded. And the Court made no point of the matter, which it would had there been any question about it. Yet it held that the suit was not a suit against the state and hence forbidden by the common law rule that a sovereign is not suable. It was within the amendment and yet not within such rule.

(9) I, therefore, conclude that the assessment complained of is a violation of the Fourteenth Amendment if thereby plaintiff is denied the equal protection of the laws. It is claimed that it is denied in that the assessing officers, to-wit, the county assessors and boards of supervisors and the state board of equalization, who have to do with the assessment of the property of individuals and of corporations not subject to the jurisdiction of the Board of Assessment and Valuation, constituting the bulk of the assessable property in this state, uniformly and purposely assessed such property for the same year at less than 60 per cent of its fair cash value and the board itself which has jurisdiction of the assessment of the property of the banks and trust companies in the state assessed the
380 whole of same for the same year at 80 per cent of the par value, whereas the assessment of plaintiff's franchise made by the board was at more than its fair cash value. That such a discrimination against plaintiff is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment is settled beyond question. A direct authority to this effect is the case of Taylor v. Louisville & Nashville Railroad Company, 88 Fed. 350, containing a decision of the Sixth Circuit Court of Appeals. It went there from the Circuit Court of Tennessee. By the constitution of that state it is provided that all property shall be taxed "according to its value" to be ascertained as the legislature shall direct "so that taxes shall be equal and uniform throughout the state." These provisions are substantially the same as those in the constitution of this state, to which allusion has heretofore been made. It was held in that case that an assessment upon a railroad property at its full value when it was the uniform practice in the

various counties of the state to assess real property at not exceed
75 per cent of its true value, which was both in violation of
constitution and of a statute passed pursuant thereto requiring
property to be assessed at its full value, was invalid under the F
teenth Amendment.

To the same effect is the decision of the same Court in the cas
Louisville Trust Co. v. Stone, 107 Fed. 305, which went there f
the Circuit Court of this state. It involved the validity of an as
ment by the Board of Valuation and Assessment the same b
whose assessment is involved here, under the provisions empowe
it to assess the property of banks and trust companies,
381 similar discrimination to that relied on in the earlier case
relied on therein. And it was held that if there had bee
fact such discrimination the assessment would have been inv
The relief sought was denied solely on the merits.

And both these decisions find support in the Chicago Unio
Company case, heretofore referred to, the decision in the Louis
Trust Company case being cited therein by Mr. Justice Peck
with approval. The facts in the case differed somewhat from
facts as they really were in the Louisville & Nashville Railroad C
pany case and as they were claimed to be in the Louisville Trust C
pany case, but the principle involved and applied therein was
actly the same as that involved and upheld in those two cases. T
the discrimination was between corporations of the same class
made by the same board. Seemingly under the Illinois constitu
the franchises of a corporation may be assessed at a different
from that of other property in that state, so that there was no e
of a discrimination between the assessment of the franchise of
plaintiff in that case and the assessment of other property in
state. The sole discrimination was between the assessment of pl
iff's franchise and that of the franchises of other corporation and
discrimination was made by the board whose assessment was
plained of. It is in these particulars that the facts of that case d
from this. But there is nothing in the circumstance that the
crimination was between corporations of the same class to render
decision inapplicable here. The thing that made the discrimina
fatal to the assessment complained of was that the law required
formity as to all members of the class. So here the fu
382 mental laws of the state requires uniformity between all
sons and the plaintiff is discriminated against in tha
property in the state, except possibly that of other railroad
panies like it, is assessed at much less than its fair cash value wh
its property is assessed at not less than its fair cash value. In
it has been so discriminated against it has been denied the equal
tection of the laws. I am now assuming the fact of a discrim
tion. Whether in fact there has been a discrimination as cla
will be considered later.

Nor is there anything in the circumstance that the discrimina
there was made by one board to render this decision inapplic
here, in so far as discrimination was brought about by the actio
the county assessors and boards of supervisors and state boar

equalization, in assessing the property subject to their jurisdiction at less than 60 per cent of its fair cash value and the action of the Board of Valuation and Assessment in assessing plaintiff's franchise in this state at its fair cash value or more. It is urged by defendants that the members of the board in so doing complied with the constitution and laws of the state and respected their oaths and consciences and their action should not be condemned because the other assessing officers of the state did not do likewise. Instead of seeking to have their work overthrown steps should be taken calculated to make those officers do their duty likewise. This line of argument was advanced in the case of Louisville Railway Company v. Com., 105 Ky. 710, where *is* was held in accordance with the defendants' contention here. In order that the full force of this position
383 may be grasped I quote from Judge Paynter's opinion therein quite fully. He said:

"The contention of counsel for appellant is to the effect that if other officers of the state disregard the constitutional provision and the statutes requiring them to, assess property at its fair cash value, the Courts should adjudge that the action of the Board of Valuation and Assessment in assessing franchises at their fair cash value, estimated at the price they would bring at a fair voluntary sale, should be set aside. It is certainly an unusual demand that the action of officers should be disregarded although they may have acted in strict conformity to the law imposing the duty. The officers take an oath that they will faithfully discharge their duties, and, if they have due respect for their oaths, they are bound to follow the requirements of the organic and statutory law of the state. There never can be exact equality and uniformity in taxation. The purpose of the constitutional provision in question was to require all property to be assessed at its fair cash value. There is no way to execute that provision of the constitution, except officers be selected by the people for the purpose of assessing the property, that revenue may be raised to carry on the government. It does not seem to be logical, or sound in principle to say that because one officer, or a class of officers disregard the law, the action of those who strictly follow it, for that reason should be annulled. If that be a proper view, then the constitutional provision and statutes become a dead letter, and the Courts will be continually called upon to disregard the legal actions of legally constituted officers because other officers in the state have acted illegally. The Court is called upon to constitute itself an instrument, not to uphold the constitution, but to make complete the utter disregard of its provisions by not sustaining a proper and legal action of the officers of the state in the performance of their duties. If the officers of the state are not properly assessing the real and personal property of the several counties of the state and if the railroad commissioners of the state are not faithful in the discharge
384 of their duties in assessing the railroad property of the state, then there must be a change of the personnel in the various officers of the state so as to bring about, in so far as possible, that equality of assessment and taxation can be had. A speedier way would be to enforce the penal and criminal statutes of the state, if

they are being violated. If they are, the prosecution of an officer would suffice to correct the evil complained of. It may be said that this will take time and leave some of the taxpayers of the state to bear an unequal proportion of the burdens of taxation. It is far better that this should be done for a short time, rather than for the Courts to adjudge illegal that which the organic law of the state declares is legal. We cannot give our consent to declare void a proceeding because such proceeding conforms to the law."

But the invalidation of plaintiff's assessment because of such discrimination would not be because it conformed to the law. Neither it nor the board for making it would be condemned. The condemnation would be of the other assessing officers for not doing their duty likewise. It is they and not the board, who have denied plaintiff the equal protection of the laws. By not assessing the property subject to their jurisdiction at its fair cash value they have made it so that if the assessment stands plaintiff will have to pay more taxes than it otherwise would. The plaintiff has no other remedy than to have the assessment against it cut down. It can neither prosecute the delinquent officers or choose their successors. Confessedly, if the board had had jurisdiction of the assessment of such other property and made the discrimination between it and plaintiff's property the discrimination of the latter could not stand. But the mere fact that the state sees fit not to entrust the matter of assessing all property to one body but imposes the duty of assessing different properties
385 on different officers should make no difference. They should be treated as one body for together they exercise the one function of the state of assessing property for taxation. In the Louisville & Nashville Railroad Company case Judge Taft said:

"The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment."

Thus far I have proceeded on the idea that this is the only discrimination which the case presents. But it is not. It involves a discrimination made by the Board of Valuation and Assessment itself. The discrimination it is true is not between plaintiff and other companies covered by section 4077, i. e., between the companies of the same class, but between plaintiff and possibly other such companies on the one hand and other companies the assessment of whose property is imposed upon it, to-wit; banks and trust companies. There are 623 such companies in this state whose capital stock, surplus and undivided profits in this state amount to $54,425,369.64 and in the assessment thereof no account is taken of the real value thereof, but same is uniformly assessed by the board at 80 per cent of the par value or the sum of $43,140,164.50. There is nothing in the fact that the discrimination is not between companies of the same class to distinguish this case from the Chicago Union T. Company case.

The decision in the case of Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 597 is not against the position here taken. The basis thereof was that it was thought that the fact of the discrimina-

386 tion was not sufficiently established to justify the Court in interfering. In the course of the opinion Mr. Justice Holmes said:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the state, there can be no question that the state had power to tax it at a different rate so far as the constitution of the United States is concerned."

He cited a number of Supreme Court decisions in support of this position.

But it will be noted that what he said was that such a discrimination was not in violation of the United States constitution and that he was not careful to indicate that what he meant was that such was not the case if it was permitted by the constitution and laws of the state. The cases cited show that he could have meant nothing else. In other words what he meant was that such discrimination was not in and of itself, i. e., nothing else appearing, a violation of the federal constitution. He did not and could not have meant that, if it was prohibited by the constitution and the laws of the state, it was not then a violation of the federal constitution. Such a discrimination is a denial of the equal protection of the laws and that is prohibited by the express terms of the Fourteenth Amendment. Inasmuch as in this state the constitution and laws expressly provide that all property whether owned by corporations or individuals shall pay the same rate of tax, the statement was irrelevant to the case in hand. It had no application whatever to it. And the making of it was calculated to mislead in two directions. It was calculated to cause it to be thought that such a discrimination in this state or in any

387 other state whose constitution and laws are the same as here in this particular is not a violation of the federal constitution. It has naturally misled the defendants in this direction. The other particular in which it was calculated to mislead was in causing it to be thought that the constitution and laws of this state permit of such discrimination. It actually misled Mr. Justice Peckham in the Chicago Union T. Co. case in this direction. In his opinion therein he said:

"There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the state which the state might do."

And in support of the statement that the state might make such discrimination he cited the Louisville & Nashville Railroad Company case under consideration.

There can be no question, therefore, that if there has been such discrimination as claimed by plaintiff, i. e., if its property has been assessed at not less than its fair cash value and the other property in this state except possibly that of other railroad companies of similar character has been uniformly and purposely assessed at substantially less than its fair cash value that the assessment is void at least to the extent which it exceeds the percentage of such other property.

That the board has assessed the entire capital surplus and undivided profits of the banks and trust companies throughout the state

at at least 20 per cent less than its real value, cannot be disputed. The assessment itself shows that same is assessed at 80 per cent of its par value as heretofore stated. And I take it that no one will
388 claim that such property is not worth at least par. The likelihood is that it is worth considerably more than par.

As to the property owned by individuals and corporations subject to assessment by the county assessors and boards of supervisors and the state board of equalization there can be no question that it too has been uniformly and purposely assessed at less than its fair cash value, possibly as much as 40 per cent less. In the case of Louisville & Nashville Railroad Co. v. Coulter, supra., which involved plaintiff's franchise assessment for the year 1902, just ten years before the one involved here I held that such property was under assessed at least 20 per cent. One of the circumstances on which I largely relied as showing that it was not assessed at a greater value than 80 per cent was the comparison of the transfer sheets required to be laid before the state board of equalization with the assessed value, but as property covered by those sheets was generally assessed at a higher rate than other property in order to prevent the showing made by them affecting the assessment of the county by the state board of equalization as the evidence in that case indicated, the conclusion there reached does not shut out absolutely a contention that such property is assessed at lower than 80 per cent. The Supreme Court on the appeal differed with me as to the fact of the discrimination. It did not hold that there had been no discrimination, but that it was not so palpable that the reluctance of Federal Courts to intervene in such matters should give way and the assessments be overthrown. And the weakness in plaintiff's case was thought to be as much in the claim that its property had been assessed at its fair cash value, essential to constitute the discrimination relied on, as in the claim
389 that the other property had not. Concerning my reasoning therein as to the under assessment relied on Mr. Justice Holmes said:

"The reasoning is careful and elaborate and cannot be read without an impression that probably it is correct to the extent of establishing a general under valuation of land."

I confined myself in that case entirely to reasoning from the facts in evidence. I might have been justified in saying then as now that it is a matter of common knowledge to any one living in this state with a reasonable acquaintance with its affairs that such is the case.

Here no one claims that such is not the case. On the contrary it is expressly admitted to be so. In the course of the oral argument the attorney general expressed himself this way:

"I recognize the fact that the people throughout the state of Kentucky, except those who have only small tracts of land list their property at far less than the value of the property. There are two classes of people who list their property so that you can determine whether it is listed at its fair cash value and that is the class who own property worth less than $2,000 and the corporations who make a sworn statement from which you can see all the property owned by them.

I agree with your Honor and the statement *of* the gentlemen have made here that there is throughout the country a disposition, not only on the part of the officers but on the part of individuals to violate the constitution. And the law of the state by listing property at less than its fair cash value, estimated at what it would bring at a fair voluntary sale. It is alleged in this bill that the officers do that. But they will never be able to prove that any officer or set of officers intends to list property differently or to discriminate. As your
390 Honor knows from experience, when a man comes to list his farm worth $2,500 or $3,000, he will list it at $1,200 or $1,500. He puts it down himself at that figure and then if the assessor or the board of equalization attempts to raise him, he brings to bear all the political and personal influence he can command to prevent the board from ra-sing his property to its true value. He does as an individual exactly what the corporations do when they appear before the state board. When the state board finds from their statements filed with the auditor that they have not fixed the true value on their property they receive notice to that effect and have a hearing before the board, and what do they do? They use all their influence, and bring to bear the importunities and persuasions of their friends to keep the board from placing a higher valuation on their property. For these reasons it is almost impossible for any officer, either county or state, to assess the property of individuals or corporations, as his oath requires, at its true value."

And in Mr. Rich's brief he says:

"Defendants do not mean to defend or attempt to defend the acts of the assessors in this state who disregard their oaths of office by assessing property at less than its fair cash value in plain defiance of the statutory and constitutional mandates on this subject, but on the contrary regard such conduct on the part of such officers, as highly reprehensible. The question is what is the remedy for this state of affairs."

In the fact that the board assessed the assets of the banks and trust companies, whose numerous stockholders are scattered all over the state, at 80 per cent of par value is a strong circumstance in favor of the position that in its opinion the ordinary property of the state is assessed at no greater percentage of real value *that* this 80 per cent of par value is of the real value of such property.
391 There is no accounting for the boards so assessing such property except on the hypothesis that it thought that the property of banks and trust companies should pay no greater percentage of real value than the ordinary property of the state paid and such percentage of par value of the one reasonably represents the percentage of real value at which the other is assessed.

The main ground upon which Mr. Justice Holmes hesitated to accept the conclusion which I reached in the Louisville & Nashville Railroad Company case and which he said was probably correct and to act upon it was the testimony therein of the members of the board of equaiization. But such a ground for hesitation no longer exists. The board for the years 1910 and 1911 in its reports to the governor

frankly admit the underassessment. In the report for the year 1910 it said:

"The revenue laws provide that all property shall be assessed at its fair cash value. It was not contended that this was done in a single county; therefore, the board of equalization was not privileged to reduce any assessment. We selected those counties that most nearly conformed to the requirements of the law and endeavored to equalize the others with them."

And again:

"The increase made by the state board of equalization averages 8 per cent and with this addition, is no measure of the fair cash value of the property in the state."

In the report for the year 1911 it said:

"In this as in former years, there was no occasion for reducing any county's returned assessment. Not one of them was as-
392 sessed at a measure of its fair cash value."

And again it said:

"All witnesses who appear before the board are appointed by the county judge after he has received notice of a tentative raise by the board. It is seldom that the judge will select a witness who has not formed an opinion and expressed a desire to appear in defense of his county. All the evidence before the board is ex parte. The record is made up by the county officials and all witnesses selected for the purpose of testifying for the defense.

"There are a few good assessors in the state—we say a 'few' for the lack of a general term that expresses a lesser number.

"The impression seems to be gaining ground throughout the state that we have a 'single tax' system, and that personal property is exempt from taxation, and, inasmuch as real estate is compelled to bear the burden, it is the privilege of the owner and the duty of the officials to connive to list all property at a very low figure. In the matter of personal property no witness testified that the assessor claimed to have assessed it fully, or that the owners had intended to give it in at its worth. In substance, they contend that it is not given in anywhere, and excuse themselves on the ground that it is a matter of perjury or poverty, and exercise their right of choice.

"The result is that after the number of lists that the assessor arbitrarily increases is added to the number that the County Board of Supervisors raise, there remains about 95 per cent of the people in the state who fix the sum themselves upon which they are willing to pay taxes, and it is a safe assertion that 99 per cent of that 95 per cent are not inclined to pay a great amount.

"From the testimony of the average witness who appears before this board, there is very little good land in his section of the state, and what is there is mainly in adjoining counties; in his particular county there is a poor streak extending the length and width
393 of the county from which all the timber has been cut and marketed; the process of erosion has carried all the fertile soil into the Gulf of Mexico; that a peculiar and unprecedented condition exists in regard to the bottom lands in his county, unlike the conditions along most streams that enrich the land, but the current

of the stream changes and washes it away, and if by accident there is a deposit, it is always of sand, that destroys its future productiveness; that there is here, and there an occasional oasis of small area upon which the tireless farmer can eke out an existence, and, by the addition of a small mortgage, pay his taxes.

"The cities do not labor under the same difficulties, but their difficulties are just as difficult. It seems that in all the cities the railroads have secured quantities of land for terminal facilities that are withheld from assessment; in addition to which, the smoke, noise and dust has destroyed the value of property for blocks on either side, schools and churches have also acquired valuable property which is exempt from taxation; this also lessens their total. The money in banks is owned by non-residents, country banks and the federal government. The remaining few dollars, left among their citizens is mainly for the purpose of street car fare. Business has been removed from the principal streets and is yet unlocated. In fact, the city would go into the hands of a receiver if there were anything to receive or anybody who would receive it.

"Many counties insist that any increase in their present assessment would impoverish them; possibly, this complaint has been loudest from the pauper counties that are a liability of the state—that not only expend every dollar collected for taxes in their own county, but are beneficiaries from the state of many thousands dollars each year."

There is a note of exaggeration as well as humor here. But it is a case where exaggeration was permissible in order to bring out sharply the real truth of things.

394 These reports are followed by that of 1912, the same year as that of the assessment involved herein. And in it we have this statement:

"Our figures for this year show a decrease in the total assessments on real and personal property. We made raises only where a great falling off was shown in assessment as compared with the preceding year, it being the policy of the board not to increase arbitrarily the assessment of any county."

The existence of this substantial underassessment of such property is confirmed by the showing made by the United States Census. According to the census of 1900 the assessed value of farm property in this state, consisting of land, building, machinery, implements and live stock was 63 per cent of the cash value, whereas according to that of 1910 the percentage was 51.6 per cent. This fall was no doubt due to the fact that the property had increased substantially in cash value during the ten years whereas there had been no substantial change in the assessed value. Progress, therefore, has been made along the line of truthfulness since 1902. No longer do the courts have to contend with the sham and pretense that ordinary property in this State is assessed at its fair cash value or substantially so.

As to whether the board assessed plaintiff's franchise at its fair cash value it seems certain that the board intended to so fix it and, when it left its hands, thought that it had done so. The board's record sheds no light on the matter. The notices of the preliminary

and final assessments state that the value placed on the part of plaintiff's capital stock apportioned to this state is the "cash value." It is apparent how the value of plaintiff's franchise was arrived at on the preliminary assessment. It was predetermined that the franchise should be assessed at $52,500,000. This predetermination was either arbitrary or what Mr. Justice Holmes terms in the
395 Chicago B. & Q. R. R. Co. case an "intuition of experience." It was not the result of a valuation of plaintiff's capital stock and an allotment of a part thereof on some basis to this state. I make this out by the consideration that in the notice of the preliminary assessment the cash value of the part of the capital stock in this state was placed at $81,670,377 and that the assessed value of the tangible property therein, to-wit, $29,170,377 was deducted therefrom, leaving $52,500,000 as the value of the franchise. This shows that the cash value of the part of the capital stock was obtained by adding to the amount at which it had been predetermined to assess the franchise, to-wit, $52,500,000, the assessed value of the tangible property, to-wit, $29,170,377 and in no other way. The conclusion is confirmed by the fact that this same course was pursued in the case of the assessments at the same time of the franchises of the Illinois Central Railroad Company, the Chesapeake & Ohio Railway Company and the Cincinnati, New Orleans & Texas Pacific Railroad Company, each of which is involved before me in a separate suit. There is, therefore, not the slightest indication in what is known in regard to the preliminary assessment that the board intended to assess at less than fair cash value. That it was the intent of the board to make the final assessment at the fair cash value and that it thought it had done so appears from the statements made in the affidavit- of the three members of the board prepared before the oral argument and then filed. They are exactly alike and in each one a statement is made eight times as to the value at which the franchise had been assessed and always the phraseology used is the same. It is that in the opinion of the members of the board the amount at which
396 the assessment had been made was "not more than the fair cash value." It is also stated several times that the board did not know or believe it to be true that "the assessing and taxing authorities of the state of Kentucky systematically, habitually, intentionally and designedly assess and have assessed the property of individual and other corporations for taxation in the state of Kentucky at less than its fair cash value estimated at the price it would bring at a fair voluntary sale." In view of this ignorance the board would hardly assess plaintiff's franchise at less than its fair cash value. Then it is stated positively that the board sought "to ascertain the correct value of plaintiff's franchise" and "strictly followed the statutes of Kentucky defining the duty of the board considering with said statutes the decisions of the Kentucky Court Appeals." As those statutes require the assessment to be at the fair cash value and the Kentucky Court of Appeals held in the Louisville Railway Company case that an assessment at such value would not be invalid notwithstanding that other property was substantially underassessed, it must be taken that the meaning intended to be conveyed by this

language was that the assessment in question was made at the fair cash value.

If then there were nothing else in the case than the consideration to which I have referred it would have to be accepted as beyond question that the board made no effort to equalize the assessment of plaintiff's franchise with the assessment of ordinary property, but that it intended to assess and thought it had assessed plaintiff's franchise at its fair cash value. But this is not all there is bearing on the matter. The supplemental affidavit of the auditor,
397 heretofore referred to, has to be considered in this connection. It was prepared and filed after the oral hearing of the demurrer and motion for preliminary injunction, which lasted several days, and that because at that hearing I made the request that an explanation be given as to the method pursued by the board in making the assessment and the various steps in it. In making the request I was not prying into the mental process by which the members of the board had come to any conclusion. I called merely for the conclusions, which the statute required it to reach and which, as I have held, should have been entered upon its record and of which plaintiff should have been informed. And I called for them in the interest, if possible, of upholding the assessment. On its face this affidavit is inconsistent with the original affidavit. As shown, according to the latter, the board made no effort to equalize the assessment of plaintiff's franchise with the assessment of ordinary property and intended and thought that it had assessed same at its fair cash value. According to the supplemental affidavit it did make an effort to equalize and did not assess the franchise at its fair cash value. The value of this affidavit as tending to show that it so did is affected by other considerations than that it conflicts with the former affidavit. It presents two different equalizations, both of which could not have been used and one of these is certainly not real. According to this one the equalization was at 80 per cent of fair cash value, but it is evident that it was brought about by finding out what amount the amount at which the value of the part of the capital stock in this state was finally fixed as shown by the notice of the final assessment, to-wit, $74,598,451, was 80 per cent of and then taking that amount as
398 the amount at which the value of such part was fixed before the equalization. The affidavit indicates just what one would expect, under the circumstances, to-wit, an inability on the part of the board to give the exact figures by which it arrived at the amount of $74,598,451 at which it fixed the amount of such part. Unless it preserved a memorandum of its calculations the members of the board could not retain it in their memory and there is no indication that it preserved any such memorandum. Besides apparently no reliance is placed on the statement of the affidavit by the defendants. They do not claim that the board did in fact make any attempt at equalization. Their position is that it was not bound to equalize and that the validity of its assessment is not affected by the fact that it did not equalize and the assessment is at fair cash value. I think, therefore that the true construction to be placed on the affidavit is that it does not undertake to set forth just how

the assessment was made but how it might have been made so as to equalize. Its statements are so involved and confused that possibly I have done it an injustice, but I think that in the absence of any cross-examination of the members of the board I should dispose of the motion for a preliminary injunction on the basis that the board in making the assessment intended to fix and thought it had fixed the value of the franchise at its fair cash value.

It follows from what I have said that the demurrer should be overruled and that conditionally, at least, the plaintiff is entitled to the preliminary injunction sought.

399 And on a day following, towit, September 27, A. D. 1915, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

Upon the call of the civil docket of this court at this date, it is ordered that this case be and it is hereby passed and in the event no order is made herein, the case is hereby continued.

400 And on a day following, towit, on December 16, A. D. 1915, an order was made and entered herein, same being in words and figures as follows, towit:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This day came the complainant and tendered its verified supplemental bill and moved the court to file the same pursuant to notice accepted in writing December 13, 1915 by Honorable M. M. Logan, Assistant Attorney General of Kentucky for defendants, which notice is filed herein, and thereupon by consent of counsel in writing filed herein said motion was continued until January 5th, 1916, at 10:30 o'clock A. M. at Frankfort.

401 And on the same day, towit, on December 16, 1915, a notice was filed herein, same being in words and figures as follows, viz:

Kentucky Franchise Tax Case, 1913.

In the District Court of the United States for the Eastern District of Kentucky.

In Equity.

No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

Notice.

To Honorable James Garnett, Attorney General:

You are hereby notified that the plaintiff in the above styled case will on Thursday, December 16, 1915, at 4:30 o'clock P. M., at Chambers in the city of Catlettsburg, Kentucky, move the court to file a supplemental bill of complaint therein, a copy of which is hereby handed you.

HELM BRUCE,
WILLIAM A. COLSTON,
EDWARD S. JOUETT,
ROBERT E. FLEMING,
HENRY L. STONE,
Solicitors for Plaintiff.

The above notice is hereby accepted this 13th day of December, 1915.

M. M. LOGAN,
Ass't Attorney General of Kentucky,
for Defendants.

402 Said supplemental bill tendered on December 16, 1915, and filed on March 13, 1916, by order of court, is as follows, to-wit:

In the District Court of the United States for the Eastern District of Kentucky.

In Equity.

No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
versus
H. M. BOSWORTH et al., Defendants.

Supplemental Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Kentucky:

The plaintiff, Louisville & Nashville Railroad Company, by way of supplemental bill of complaint to its original bill, respectfully shows unto the court:

XXVI.

That since the filing of the original bill of complaint this cause has been submitted for final decree, and the court has, on August 31, 1915, delivered an opinion wherein it is held inter alia:

403 (1) That the percentage to be used in apportioning to Kentucky the proportion of the value of the total unit or the entire value, tangible and intangible, of complainant's property wherever situated, is the percentage to be arrived at from a consideration of all mileage operated, owned, leased or controlled by complainant wherever situated, but

(2) That the Board in valuing the entire unit or entire property, tangible and intangible, of complainant wherever situated, did not value the whole of the unit, because it failed to include that part of the value of the controlled mileage held or owned by others.

And it is further stated in said opinion as follows:

"A decree will be entered enjoining defendants from enforcing the assessment complained of and from making and enforcing any other assessment of plaintiff's franchise for the year 1913 on condition that it pays the taxes, State and local, on $2,909,192.60, in addition to what it has paid. But, if either side desires it, the decree may be limited to an injunction against the enforcement of the assessment complained of without prejudice to the making and enforcing of another assessment for that year to be equalized at 60 per cent and to be credited with the sum on which payment has been made."

Plaintiff says that it is not possible, according to any reasonable or legal method, to arrive at a value for assessment of plaintiff's franchise or intangible properties in the State of Kentucky for the year 1913 greater than the amount of the assessment on which plaintiff has already paid taxes, to-wit: $22,899,200.00, and plaintiff

says, therefore, that it would not be just or equitable to require that it should pay any amount in addition to what it has paid as a condition for securing the injunction prayed for, and plaintiff further says that it would not be equitable, and the full relief which equity contemplates would not be afforded plaintiff if a further assessment is permitted by the decree, unless said further assessment be limited to the amount on which plaintiff has already paid its taxes.

404

XXVII.

Plaintiff has already paid its taxes on a valuation of its franchise or intangible properties in Kentucky for the year 1913 of $22,899,200.00, and plaintiff says that it is not possible, even according to the method set forth in this Honorable Court's said opinion for valuing the entire unit, or all of plaintiff's property, tangible and intangible wherever situated (which method plaintiff does not admit to be a correct one), to arrive at a greater value for assessment of plaintiff's franchise, or intangible properties, for taxation in the State of Kentucky for the year 1913, than said value on which it has already paid its taxes, or greater than.... $18,398,438.43.

And plaintiff sets forth in the following tables the correct calculations, both on the stock and bond plan and on the capitalization of income plan, according to this Honorable Court's method of valuing the entire properties and for distributing them:

405 Stock and Bond Plan:

The value of the unit or of all of the property of the plaintiff, tangible and intangible, wherever situated, as arrived at on the stock and bond plan, as shown by Exhibit Geo. W. Lamb No. 6, and as set forth in Paragraph XXI of the original bill was	$227,035,292.84.
to which adding the value of the entire N., C. & St. L. R'y, held by others	$21,065,850.30.
and likewise adding similar values for the C., I. & L. R'y	$26,308,932.00.
and for the L., H. & St. L. R'y	$4,113,344.54.
and for the N. O., M. & C. R.	$19,411,035.70.
and for the Georgia Railroad and dependencies	$13,862,650.00.
and for the South and North Alabama Railroad	$8,279,128.67.
and for the Central Transfer R'y & Storage Co.	$35,000.00.
and for the Elkton & Guthrie Railroad	$57,372.00.
and for the Glasgow Railroad	$300,000.00.
we have as the total value of the unit or entire value of all the mileage operated, owned, leased or controlled, according to this Honorable Court's plan	$320,468,606.05.

The percentage relation that the mileage operated, owned, leased or controlled by plaintiff in the State of Kentucky bears to
406 the total mileage operated, owned, leased or controlled by plaintiff within and without the State of Kentucky is..... 24.6901%,

from which it appears that, according to this Honorable Court's plan on the stock and bond basis, 100 per cent or full value of the Kentucky proportion of the value of the unit is.. $79,124,019.31,

which equalized at 60 per cent, represents a total value, tangible and intangible, subject to taxation in the State of Kentucky of..... $47,474,411.59,

from which deducting the value of the tangible property assessed for taxation—

L. & N. R. R. Co.....	$28,806,072.00
Wasioto & Black Mountain Railroad	304,085.00
Morganfield & Atlanta Railroad	116,410.00
M., H. & E. R.....	244,305.00
Ky. Highlands Railroad.....	76,245.00
N., C. & St. L. R'y.....	669,600.00
C., I. & L. R'y.....	22,800.00
L., H. & St. L. R'y.....	1,697,100.00
Central Transfer R'y & Storage Co.	6,540.00
Elkton & Guthrie Railroad....	34,160.00
Glasgow Railway	93,950.00,

we have a total deduction for tangible assessment of. $32,071,267.00,

leaving as the franchise or intangible property of the Louisville & Nashville
407 Railroad Company and controlled and operated lines for taxation in the State of Kentucky $15,403,144.20

but franchise assessments were separately paid by controlled companies on assessments as follows:

Central Transfer R'y & Storage Co.	$23,460.00
L., H. & St. L. R'y Co.....	1,499,175.00
N., C. & St. L. R'y.....	430,400.00
C., I. & L. R'y.....	17,200.00
Glasgow Railway	113,500.00
	$2,083,735.00,

leaving as the amount of the assessment of the franchise or intangible property of the Louisville & Nashville Railroad Company for taxation in the State of Kentucky for the year 1913, according to this Honorable Court's plan, and including all mileage operated, owned, leased or controlled, set forth in the original bill of complaint, paragraph 1, on which mileage the percentage of 24.6901% was arrived at..... $13,319,409.20,

Capitalization of Income Plan.

The calculations for the same mileage on the capitalization of income plan are as follows:

The value of the unit or of all of plaintiff's property, tangible and intangible, wher-
408 ever situated, as arrived at on the capitalization of income plan, as found by the Board and used by this Honorable Court in said opinion, handed down, to-wit, on August 31, 1915, in plaintiff's franchise tax case for the year 1913, was, to-wit..... $262,252,566.00,

to which adding the value of the entire N., C. & St. L. R'y, held by the L & N. and others... $38,750,005.00,

and likewise adding similar values for the C., I. & L. R'y $19,024,339.00,

and for the Georgia Railroad and dependencies.. $21,504,106.50,

and for the Central Transfer R'y & Storage Co... $18,533.17,

and for the N. O., M. & C. R..... $7,560,815.67,

and for the L., H. & St. L. R'y..... $2,695,449.67,

we have as the total value of the unit or entire value of all the mileage operated, owned, leased or controlled, according to this Honorable Court's plan $371,737,115.01,

from which should be deducted to prevent duplication, the capitalization at 6% of the income included in amounts stated for L. & N. R. Co., as set forth below:

Dividend on N., C. & St. L. stock, owned by the L. & N. R. Co.	$430,656.00
409 Interest on N., C. & St. L. bonds owned by the L. & N. R. Co.	$3,260.00
Rent paid for the Paducah & Memphis Division by the N., C. & St. L. R'y	206,506.20
Dividend on C., I. & L. stock owned by the L. & N. R. Co. ..	236,830.12
Interest on C., I. & L. R'y bonds owned by the L. & N. R. Co...	620.00
Income from securities held under Georgia Railroad Lease and dependencies	139,626.72
Interest and dividends on stock and bonds of Central Transfer R'y & Storage Co.	1,500.00
Total	$1,018,999.04

which capitalized at 6 per cent, amounts to..... $16,983,317.33,
we have as the total value of the unit or entire value of all of the mileage operated, owned leased or controlled, according to this Honorable Court's plan ..... $354,753,797.68.

The percentage relation that the mileage operated, owned, leased or controlled by plaintiff in the State of Kentucky bears to the total mileage operated, owned, leased or controlled
410 by plaintiff within and without the State of Kentucky is ..... 24.6901%.
from which it appears that according to this Honorable Court's plan on the capitalization of income basis, 100 per cent or full value of the Kentucky proportion of the value of the unit is $87,509,067.38.
which equalized at 60 per cent, represents a total value, tangible and intangible, subject to taxation in the State of Kentucky of ..... $52,553,440.43.
from which deducting the value of the tangible property assessed for taxation—

L. & N. R. Co.	$28,806,072.00
Wasioto & Black Mountain R. ..	304,085.00
M. & A. R	116,410.00
A., H. & E. R.	244,305.00
Ky. Highlands Railroad	76,245.00
N., C. & St. L. R'y	669,600.00
C., I. & L. R'y	22,800.00
L., H. & St. L. R'y	1,697,100.00
Central Transfer R'y & Storage Co.	6,540.00
Elkton & Guthrie R.	34,160.00
Glasgow R'y	93,950.00

we have a total deduction for tangible property of $32,071,267.00.
leaving as the franchise or intangible property of the Louisville & Nashville Railroad
411 Company controlled and operated lines for taxation in the State of Kentucky.. $20,482,173.43.
but franchise assessments were separately paid by controlled and operated companies on assessments as follows:

C., I. & L. R'y	$17,200.00
L., H. & St. L. R'y	1,999,175.00
Central Transfer R'y & Storage Co.	23,460.00
N., C. & St. L. R'y	430,400.00
Glasgow R'y	113,500.00
	$2,083,735.00.

leaving as the amount of the franchise or intangible property of the Louisville & Nashville Railroad Company for taxation in the State of Kentucky for the year 1913, according to this Honorable Court's plan, including all mileage operated, owned, leased or controlled, set forth in the original bill of complaint, paragraph I, on which mileage the percentage of 24.6901%, was arrived at ..... $18,398,438.43.

Wherefore, plaintiff prays as it prayed in the original bill of complaint and further prays that if the making of another assessment in this case is to be permitted by the decree, the power of making such assessment be limited, so that no assessment should be made in excess of the amount on which plaintiff has already paid its taxes. And plaintiff further prays that the injunction shall be granted, not only against defendants herein, but also against their successors in office, and for such further or other relief in the
412 premises as the nature and circumstances of the case may require and as to the court shall seem meet.

HELM BRUCE,
WILLIAM A. COLSTON,
EDWARD S. JOUETT,
ROBERT E. FLEMING,
HENRY L. STONE,
Solicitors for Plaintiff.

STATE OF KENTUCKY,
County of Jefferson, sct.

W. L. Mapother says that he is Vice President of plaintiff, the Louisville & Nashville Railroard Company, and that the statements contained in the foregoing supplemental bill of complaint are true.

A. L. MAPOTHER.

Subscribed and sworn to before me by W. L. Mapother, this 13 day of December, 1915.

G. W. B. OLMSTEAD,
Notary Public, Jefferson Co., Ky.

My commission expires January 23, 1918.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

413 And on a day following, to wit, on December 31, A. D. 1915, an order was made and entered herein, same being in words and figures as follows, to wit:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This day came the complainant by counsel and tendered and offered to file a supplemental bill herein, and the court being advised, it is now ordered that said bill be and it is filed.

Then came defendants named in said supplemental bill, Robert L. Greene, Sherman Goodpaster and James P. Lewis, who will on January 3, 1916, become respectively, Auditor of Public Accounts, Treasurer and Secretary of State of the State of Kentucky, and as such will constitute the Board of Valuation and Assessment of said State, and M. M. Logan, Charles H. Morris, O. S. Hogan, D. O. Myatt and Victor A. Bradley, who will on January 3, 1916, become respectively Attorney General, First Assistant Attorney General, Second Assistant Attorney General, Third Assistant Attorney General, and Commonwealth's Attorney of the Franklin Circuit Court, all by M. M. Logan, Assistant Attorney General and solicitor for himself and said other defendants, and entered their appearance herein, and it is now by consent of all parties hereto, ordered, adjudged and decreed that the
414 defendant, Robert L. Greene, immediately upon his accession to the office of Auditor of Public Accounts of Kentucky, shall be substituted in place of his predecessor in office, defendant H. M. Bosworth; that defendant Sherman Goodpaster, immediately upon acceding to the office of Treasurer of Kentucky, shall be substituted in the place of his predecessor in said office, defendant, Thomas S. Rhea; that the defendant, James P. Lewis, immediately upon acceding to the office of Secretary of State of Kentucky shall be substituted in place of his predecessor in said office, defendant Carl F. Crecelius; and that said defendants, Green, Goodpaster and Lewis shall then be substituted for their several predecessors aforesaid as members composing the Board of Valuation and Assessment of the Commonwealth of Kentucky; that the defendant, M. M. Logan immediately upon his accession to the office of Attorney General shall be substituted for his predecessor in said office, defendant James Garnett; that the said Morris, Hogan and Myatt, respectively, shall be substituted for their predecessors in office, respectively, and that said Victor A. Bradley be substituted in the place and instead of said Bradley as his own predecessor.

And that upon said substitutions being made, the said parties brought into this cause by said supplemental bill, whether as entirely new parties, or as old parties holding new offices, shall take herein the places exactly of their respective predecessors in office and be respectively affected exactly as they were respectively affected by all pleadings, proof and orders herein, including the preliminary order of injunction and all other steps taken and proceedings had in this cause.

415 *2nd Supplemental Bill of Complaint, 1913 Kentucky Franchise Tax Case.*

In the District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
versus
H. M. BOSWORTH et al., Defendants.

Supplemental Bill in Equity Bringing Into This Suit the Following Additional Persons as Defendants.

Robert L. Greene, who has been elected Auditor of Public Accounts of the State of Kentucky;

Sherman Goodpaster, who has been elected Treasurer of the State of Kentucky;

James P. Lewis, who has been elected Secretary of State of the State of Kentucky;

M. M. Logan, who has been elected Attorney General of the State of Kentucky (being the person sued in the original bill herein as Second Assistant Attorney General);

—— ——, who is to be appointed Assistant Auditor of Public Accounts of the State of Kentucky;

Charles H. Morris, who is to be appointed First Assistant Attorney General of the State of Kentucky;

O. S. Hogan, who is to be appointed Second Assistant Attorney General of the State of Kentucky (being the person sued in the original bill as Third Assistant Attorney General of the State of Kentucky;

D. O. Myatt, who is to be appointed Third Assistant Attorney General of the State of Kentucky; and

Victor A. Bradley, who has been re-elected Commonwealth's Attorney for the Franklin Circuit Court.

The complainant, Louisville & Nashville Railroad Company, by way of supplemental bill, insisting upon all the allegations of its original and supplemental bills of complaint herein, now sup-
416 plements said original and supplemental bills, and further says:

XXVIII.

That Robert L. Greene, Sherman Goodpaster, Jame P. Lewis, M. M. Logan, Charles H. Morris, O. S. Hogan, D. O. Myatt and Victor A. Bradley were at the time of the filing of the original and supplemental bills of complaint herein, and now are citizens of the State of Kentucky and residents and inhabitants of the Eastern District thereof; and that —— ——, who will be appointed Assistant Auditor of Public Accounts of the State of Kentucky was at the time

245

of the filing of the original and supplemental bills of complaint herein, and is now, a citizen of the State of Kentucky and a resident and inhabitant of the — District thereof;

That the respective terms of office of defendants, Henry M. Bosworth, Thomas S. Rhea and Carl F. Crecelius, as, respectively, Auditor, Treasurer and Secretary of State, and as constituting the Board of Valuation and Assessment of the State of Kentucky, as alleged in the original bill of complaint herein, and the terms of office of defendants, G. B. Likens, as Assistant Auditor, James Garnett as Attorney General, Charles H. Morris as First Assistant Attorney General, M. M. Logan as Second Assistant Attorney General, O. S. Hogan as Third Assistant Attorney General, and Victor A. Bradley as Commonwealth's Attorney for the Franklin Circuit Court, will expire on the 3rd day of January, 1916, when their successors, respectively, will succeed them in said offices;

That at the general election held in the State of Kentucky on the 2nd day of November, 1915, the defendant Greene aforesaid was elected Auditor of Public Accounts of the State of Kentucky; the defendant Goodpaster aforesaid was elected Treasurer of the State of Kentucky; the defendant Lewis aforesaid was elected Secretary of State of the State of Kentucky; the defendant Logan aforesaid, who was sued herein originally as Second Assistant Attorney
417 General of the State of Kentucky, was elected Attorney General of said State; and the defendant Bradley was elected Commonwealth's Attorney for the Franklin Circuit Court; and that the terms of all of these offices will begin on the 3rd day of January, 1916; and that when inducted into office the said Greene, Goodpaster and Lewis will compose the State Board of Valuation and Assessment of the State of Kentucky; that the said M. M. Logan will then appoint as his First Assistant the said Charles H. Morris, who was sued herein originally as the First Assistant to defendant James Garnett, as Attorney General, and will appoint as his Second Assistant said O. S. Hogan, who was sued herein originally as the Third Assistant to defendant James Garnett as Attorney General, and will appoint as his Third Assistant the said D. O. Myatt; and that said Greene will appoint —— —— as Assistant Auditor of Public Accounts for the State of Kentucky; that defendant W. C. Marshall, who was sued herein originally as County Attorney of Franklin County in the State of Kentucky, still holds, and will continue on and after January 3, 1916, to hold the said office of County Attorney of Franklin County;

That the said several persons above mentioned, who have been elected, and those who have been appointed, and those who will be appointed, as aforesaid, to the respective offices hereinbefore mentioned, as successors, respectively, to the defendants named in the bill of complaint herein as holding said offices, and as stated in this supplemental bill, will, under color of their official powers, respectively, and each of them will, unless restrained and enjoined herein, do and perform the several acts and things which the bill of complaint herein alleged were about to be done and performed by their predecessors in office respectively; and that it is therefore

necessary that the same orders and temporary and final injunctions be entered as against the persons made defendants by this supplemental bill, and in the capacities in which they will act on and after January 3, 1916, as were made, or prayed to be made against the defendants to said original bill.

418 Wherefore, complainant prays that the said several persons above named, enumerated in the caption, be now made parties defendant hereto, and that they be substituted for their predecessors, respectively,—each according to the office and duties of his predecessor upon the succession of the officers aforesaid; that this cause proceed in continuity against the new defendants aforesaid, and such of the original defendants as will continue in office, whether in the same offices which they held when originally made defendants, or in the new offices to which they will succeed, as herein described; that the temporary injunction heretofore granted herein be extended so as to include and be operative upon each of the new defendants aforesaid, and old defendants in new offices; that the complainant have all the relief against the new defendants, made such by this supplemental bill, or old defendants in new offices, as was prayed against the original defendants to the original and supplemental bills of complaint herein filed; that complainant have process against said new defendants, or old defendants in new offices in the same manner as process was awarded against the original defendants, requiring them to answer herein, but not under oath; and, generally, that this cause proceed with the same force and effect against the new defendants and old defendants in new offices as if they had been properly joined as defendants in the original bill of complaint herein; and complainant prays for all further and general relief, and for its costs herein incurred.

HENRY L. STONE,
WM. A. COLSTON,
EDW. S. JOUETT,
ROBERT E. FLEMING,
HELM BRUCE,
Solicitors for Complainant.

419 STATE OF KENTUCKY,
County of Jefferson, sct.

W. L. Mapother, says that he is the First President of complainant, Louisville & Nashville Railroad Company, and that the statements contained in the foregoing supplemental bill of complaint are true.

W. L. MAPOTHER.

Subscribed and sworn to before me by W. L. Mapother this 29th day of December, 1915.

My commission expires January 23, 1918.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Kentucky.

420 And on a day following, towit, January 5th A. D. 1916, an order was made and entered herein, same being in words and figures as follows, viz;

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

By consent of all parties, it is ordered that the hearing of the motion by complainant to file the first supplemental bill herein, heretofore set for hearing for January 5, 1916, be and it is postponed for hearing until the first day of the March 1916 term of this court.

421 And on a day following, towit, on March 13th, A. D. 1916, an order was made and entered herein, same being in words and figures as follows, viz;

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This day came the complainant by solicitors and tendered and offered to file a second supplemental bill herein, and the court being advised, it is ordered that said bill be, and it is filed;

Then came the defendants named in said supplemental bill, T. M. Jones by M. M. Logan, Attorney General and solicitor for defendants and entered his appearance herein; and it is now, by consent of all parties hereto, ordered, adjudged and decreed that the said defendant, T. M. Jones, be substituted in place of his predecessor in office as Assistant Auditor of Public Accounts for the State of Kentucky, defendant, G. B. Lykens, and that all parties brought into this cause by said second supplemental bill and the supplemental bill herein filed December 31, 1915, whether as entirely new parties or as old parties, holding new offices, shall take herein the places exactly of their respective predecessors in office and be respectively affected exactly as they were respectively affected by all pleadings, proof and orders herein, including the preliminary order of injunction and all other steps taken and proceedings had in this cause.

422 The court being advised, it is ordered that the supplemental bill of complaint tendered herein on December 16, 1915, be and it is hereby filed.

Said second supplemental bill filed by the foregoing order on March 13, 1916, is as follows, viz:

423 Kentucky Franchise Tax Case, 1913.

In the District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

Second Supplemental Bill.

The plaintiff, Louisville & Nashville Railroad Company by way of a second supplemental bill, and insisting upon all the allegations in its bill of complaint and supplemental bill of complaint herein, now again supplements its said bill by the following allegations, to-wit:

That defendants Robert L. Greene, Sherman Goodpaster, and James P. Lewis have qualified, respectively, as Auditor, Treasurer, and Secretary of State of the Commonwealth of Kentucky, and have, since January 3, 1916, composed and now compose the State Board of Valuation and Assessment of the State of Kentucky, and said Greene has been since that date and is now ex-officio the Chairman of said Board.

That Thomas M. Jones, who is a citizen of the State of Kentucky and a resident of the Eastern District thereof, has been appointed and qualified and is now acting as the Assistant Auditor of the State of Kentucky, and said Jones is now made a defendant herein.

That defendant M. M. Logan has qualified as Attorney General of the State of Kentucky, and has, since January 3, 1916, been acting and is now acting as such.

That said M. M. Logan on January 3, 1916, appointed de-
424 fendants Charles H. Morris, O. S. Hogan, and D. O. Myatt as, respectively, First, Second, and Third Assistant Attorneys General, who, since their said appointment, have duly qualified and have continued to act and are now acting as such officers.

That defendant Victor A. Bradley qualified on the same day as Commonwealth's Attorney for the district wherein Franklin County is situate, under the new term for which he was elected, and has since continued to act and is now acting as such.

The plaintiff repeats all the allegations contained in its original and in its supplemental bill of complaint and prays as is prayed in each of said pleadings and for all further proper relief to which in equity the plaintiff may appear to be entitled.

HELM BRUCE,
WILLIAM S. COLSTON,
ED S. JOUETT,
ROBERT E. FLEMING,
HENRY L. STONE,
Attorneys for Plaintiff.

425 STATE OF KENTUCKY.
County of Jefferson, set:

W. L. Mapother, says that he is First Vice President of plaintiff, the Louisville & Nashville Railroad Company, and that the statements contained in the foregoing second supplemental bill are true.

W. L. MAPOTHER.

Subscribed and sworn to before be my W. L. Mapother, this 9 day of March, 1916. My commission expires on the 23rd day of January, 1918.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Kentucky.

426 And on a day following, towit, June 13, 1916, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This day came the plaintiff by its counsel, Helm Bruce, A. W. Colston and Henry L. Stone and tendered and moved the court to enter, in conformity to its opinion delivered and filed herein August 31, 1915, a decree in the following words and figures, towit:

Decree.

Tendered but not entered.

In Equity.

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

This cause coming on to be heard at this term on the merits, and having been argued by counsel, and upon consideration of the pleadings, exhibits and evidence, it is now ordered, adjudged and decreed as follows viz:

1. That the assessment of plaintiff's franchise made towit, on December 29, 1913, by the Board of Valuation and Assessment of the State of Kentucky for the taxes of 1913, towit, at the sum or value of $45,658,630.00 was and is null and void.

427 2. That all defendants herein and each of them and their respective successors in office are hereby perpetually enjoined from taking any steps whatever based upon said assessment and from attempting to collect any taxes based thereon or in any way recognizing the validity thereof, or giving any effect thereto.

3. The plaintiff by its counsel having announced to the court its

unwillingness to pay taxes, state or local on $2,909,193.60 in addition to what it has paid, this decree shall be without prejudice to the making of another assessment of plaintiff's franchise by said Board of Valuation and Assessment for the year 1913 based on plaintiff's condition for the year ending June 30, 1912, provided such re-assessment be made within three months from the entry of this decree, and provided further that in making such re-assessment if one be made, the re-assessment shall be equalized with the assessment of other property in the State of Kentucky on the assumption that such other property was systematically, intentionally and habitually assessed for taxation for the said year not exceeding 60 per cent of its fair cash value, estimated at the price it would have brought at a fair voluntary sale, which the court hereby finds to be the fact; and provided further that, in making such re-assessment, if one be made, the apportionment of a part of the total values of plaintiff within the State of Kentucky and elsewhere, shall be made in the ratio which the length of the lines operated, owned, leased or controlled in the State of Kentucky bore to the total length of the lines operated, owned,
428 leased or controlled in the State of Kentucky and elsewhere; and provided further, that, in making such re-assessment, if one be made, due credit and allowance shall be given to the fact that plaintiff has paid franchise taxes for said year on amounts aggregating $22,899,200.00. Of the time of making such re-assessment, if any be made, the said Board shall give to plaintiff written notice, with a reasonable opportunity to be heard thereon. But, if such re-assessment be not made within three months from the entry of this decree, then said defendants and each and all of them are hereby perpetually enjoined from making any additional assessment of plaintiff's franchise for the year aforesaid, and the court reserves power and jurisdiction over the subject of this suit and the parties thereto in order to protect the plaintiff, if it becomes necessary, against the enforcement of any re-assessment of the franchise by said Board for said year not made in compliance with the provisions aforesaid of this decree and with the opinions of the court heretofore delivered and filed herein and to finally dispose of this suit." "June 13, 1916," to the entry of which proposed decree as tendered, the defendants by M. M. Logan, Attorney General, objected, and, thereupon, the court sustained said objection, and refused to enter said proposed decree tendered as aforesaid, to which ruling plaintiff by its counsel excepted.

429 And on a day following, towit, June 13, 1916, a decree was entered herein, same being in words and figures as follows, to wit:

District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

Decree.

This cause coming on to be heard at this term on the merits, and having been argued by counsel, and upon consideration of the pleadings, exhibits and evidence it is now ordered, adjudged and decreed as follows, viz:

1. That the assessment of plaintiff's franchise made, towit, on December 29, 1913, b ythe Board of Valuation and Assessment of the State of Kentucky for the taxes of 1913, towit, at the sum or value of $45,658,630.00 was and is null and void.

2. That all defendants herein and each of them and their respective successors in office are hereby perpetually enjoined from taking any steps whatever based upon said assessment, and from attempting to collect any taxes based thereon or in any way recognizing the validity thereof, or giving any effect thereto.

3. That the plaintiff shall within sixty (60) days, pay franchise taxes to the State of Kentucky on a valuation of $2,909,292.60 in addition to what it has already paid on: that is to say, in addition to the taxes which it has paid on an assessment or value of
430 $22,899,200.00, so that the entire amount or assessment on which franchise taxes shall have been paid to the State of Kentucky by plaintiff for said year shall be $25,808,493.60, and this decree shall be without prejudice to the apportionment by the said Board of Valuation and Assessment of a proper apportionment of said additional valuation or assessment of $2,909,292.60 to the counties, cities, towns and taxing districts through or into which plaintiff's lines pass or are operated, and without prejudice to the certification by the Auditor to the proper county clerks, after final determination of said value or proportion of the amount thereof liable for county, city, town or district taxes, so that the entire amount on which plaintiff shall have become liable for county, city, town or district taxes on its franchise for said year, including the amounts on which it has already paid taxes shall be $25,808,493.60, but due credit and allowance shall be given for the apportionments already made of the values of plaintiff's franchise for taxes for said year, and for the amount of taxes already paid by plaintiff on its franchise for said year to the State of Kentucky and to the counties, cities, towns and taxing districts of said State.

4. It appears from the record herein that no assessment of plaintiff's franchise for the year 1913 for taxation in the State of Kentucky can lawfully be made in any sum in excess of the sum of $25,-

808,493.60, on which basis it is required by this decree that plaintiff shall pay all taxes due to the State of Kentucky and to the various sub-divisions thereof in which lie part of plaintiff's lines, and

431 It is, therefore, further ordered, adjudged and decreed that defendants, Robert L. Greene, Auditor of Public Accounts, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State of the State of Kentucky, constituting the Board of Valuation and Assessment of said State, individually and as members of and constituting said Board, and their respective successors in office, and the defendant Thomas M. Jones, Assistant Auditor of Public Accounts of the State of Kentucky, and his successors in office, be and each and all of them are hereby perpetually enjoined from making any assessment of the franchise of plaintiff for taxes for the year 1913 in excess of said sum of $25,808,493.60, and from apportioning any assessment in excess of that amount for taxes for the year 1913, among any of the counties, cities, towns or taxing districts of the State of Kentucky; and in any assessment or apportionment which may be made of plaintiff's franchise for said year due credit and allowance shall be given for the apportionments heretofore made and for the taxes heretofore paid by plaintiff on such account, and, except as expressly provided for in paragraph 3 of this decree, all defendants herein and each of them and their respective successors in office and each and every other person are hereby perpetually enjoined from taking any steps to collect or attempt to collect any additional amount from plaintiff on account of any taxes on its franchise claimed to be due for the year 1913, from it to the State of Kentucky or any sub-division thereof, and are hereby perpetually enjoined, restrained and commanded to refrain from instituting or prosecuting or causing to be prosecuted or instituted any pro-

432 ceedings against the plaintiff, either by indictment or civil action, because of any alleged delinquency or failure of plaintiff to pay any taxes, penalty or interest based upon any assessment or valuation of its franchise for taxation in the State of Kentucky for the year 1913.

A. M. J. COCHRAN, *Judge.*

June 13, 1916.

433 And on a day following, towit, October 27, 1916, plaintiff filed the following Statement of Evidence, same being in words and figures as follows, viz:

Kentucky Franchise Tax Case, 1913.

v.

In the District Court of the United States for the Eastern District of Kentucky.

No. 768.

LOUISVILLE & NASHVILLE RAILROAD CO., Plaintiff,
vs.
ROBERT L. GREENE et al., Defendants.

Statement of Evidence.

434 Kentucky Franchise Tax Case for 1913.

In the District Court of the United States for the Eastern District of Kentucky.

No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
vs.
R. L. GREENE et al., Defendants.

Statement of Evidence.

The following is a statement of the evidence heard on the trial of this cause.

As shown by the stipulation filed of record, the record of the proceedings before the Board of Valuation and Assessment of the State of Kentucky for the year 1913, referred to in the bill of complaint herein, which record was filed as an exhibit with the bill, was taken to be a true and correct copy of said record, and was read in evidence, and the same was in substance as follows:

Proceedings Before the Board of Valuation and Assessment.

Tentative Assessment of June 28, 1913.

The tentative assessment made by the Board on June 28th, 1913, of the franchise for that year was read and is as follows:

"At a meeting of the Board of Valuation and Assessment of the Commonwealth of Kentucky, held in the Capitol Building in Frankfort, Franklin County, Kentucky, the 26th day of June, 1913, the following order was made by said Board and directed to be recorded:

Whereas, the Board of Assessment and Valuation, this
435 day met pursuant to the call of the Chairman, for the purpose of fixing the tentative valuation of the franchise of the various railroads operating lines of railway within the State of Kentucky, and subject to a franchise tax thereon, the said Board, in session, after consideration of the report and the statements therein contained, which were made to the Auditor as of June 30, 1912, by Louisville and Nashville R. R. Co., and the report made pursuant to the Statutes of Kentucky by the officers of said Company to the Kentucky Railroad Commission for the year ending June 30th, 1912, and the statistics of common carriers compiled by the Interstate Commerce Commission for the year ending June 30th, 1912, and the report of the directors of said corporation, to the stockholders thereof, and upon consideration of the gross and net earnings of said company, and the mileage thereof, owned, operated, leased and controlled within and without the State of Kentucky, and the value of the shares of stock and the bonds of said Company, the Board reached the conclusion that the fair cash value of capital stock of Louisville and Nashville R. R. Co. in Kentucky, for the purpose of taxation for the year 1913, is $76,000,000.

Therefore, Be it ordered, that the value of the capital be now fixed at said sum of $76,000,000. and from this sum there is deducted the sum of $28,806,072. the value of all tangible property of said company assessed in this state, or in the counties where situated, and the remainder, to-wit: $47,193,928. is adjudged to be the tentative assessible value of the franchise of the Louisville and Nashville R. R. Co., in Kentucky, subject to taxation for the year 1913.

Ordered: That said corporation be at once notified so that it may show cause, if any it has or can, why said tentative assessment should not be made final.

Upon the question of the adoption of this foregoing order, upon roll call, Auditor Bosworth voted "aye", Treasurer Rhea voted "aye", and Secretary of State Crecelius voted "aye".

H. M. BOSWORTH, *Chairman.*"

Attest:
CHAS. J. VELING, *Sec'y.*

Correspondence.

436 Following said tentative assessment certain correspondence took place which was read in evidence as follows:

"June 24, 1913.

Mr. Chas. J. Veling, Chief Clerk Corp. Dept., Auditor of Public Accounts, Frankfort, Ky.

MY DEAR SIR: In a talk with the Auditor Bosworth last Friday morning coming down from Lexington on the C. & O. train, he advised me that all of the calculations and data in connection with the tentative assessment of the L. & N. Railroad for 1913, which was

given out on last Thursday, 19th inst., were in the jacket containing our report, or if not in the jacket at that time the memo. in question would be completed and everything put into the jacket by the end of last week. I told him I would like to see the figures in our case so as to make copy of them, and he said they would be in the jacket so that anybody interested could see them.

On account of the absence of Mr. Scott from this office, I find I will not have the time to come to Frankfort this week, and as we are anxious to secure these figures as soon as possible, I will appreciate it if you will kindly make copies of all of the memo. in the L. & N. jacket in connection with our tentative assessment and send them to me at the very earliest possible moment.

Yours truly,

(Sig.) R. E. FLEMING,
Special Attorney."

R. E. F.-P.

"State of Kentucky.
Office Auditor of Public Accounts.
Frankfort.

June 30, 1913.

Mr. R. E. Fleming, Special Attorney L. & N. R. R. Co., Louisville Ky.

DEAR SIR: In answer to your letter of the 24th, in which you ask me to send to you a copy of the calculations as made from
437 the report of the L. & N. R. R. Co. as of June 30th, 1912, from which report the Board of Valuation & Assessment made a tentative assessment of Total Capital at $76,000,000. I called Mr. Bosworth's attention to the contents of your letter to me, and after he read the letter he instructed me to have Mr. Rich carefully go over the figures, that he (Mr. Rich) had made and to then send to you such copy.

I did as directed, and Mr. Rich expressed a desire that we should not give any figures. I then asked him (Mr. Rich) what reply could I make to you. He told me to say that there was no figures to give, that the ones he had made were not complete, that they did not give all the items and that he was not certain as to the mileage as was on the calculation as made, and that figures were merely arbitrary, the increased amount over last year only showed an increase as shown by the report between the two years, and for me to simply tell you that there was no figures, and Mr. Bosworth then said that what he meant, was that you be furnished with a copy of the resolution, showing the action of the Board.

Yours truly,

(Signed) CHAS. J. VELING,
Chief Clerk Corp. Dept.

P. S.—Will send you copy of the resolution in a few days."

"State of Kentucky,
Office, Auditor of Public Accounts,
Frankfort.

July 11, 1913.

Hon. R. E. Fleming, Special Attorney L. & N. R. R. Co., Louisville, Ky.

DEAR SIR: Some time ago, the Auditor handed me your letter, in which you requested that you be given the calculations used by the Board in fixing the tentative assessment of the franchise of your Company and directed me to reply thereto, which I have
438 neglected to do. He directed me to say, as a member of the Board, he did not make minute calculations of its franchise value for the reason he had considered and heard fully presented by your attorneys, the question, within the last year.

In fixing the tentative assessment, the Board adopted a resolution, which embodied and fully set forth all facts and information then considered by the Board. Upon the hearing as to the correctness of its conclusion in respect to the tentative assessment, of course, a full opportunity will be given the representatives of the Company to present their views, and such additional facts and information as they may desire to present and the members of the Board can then acquaint you with their views as to the proper way or method of arriving at the value of the franchise of the Company.

Inasmuch as the tentative assessment is not final and subject to modification upon hearing, it seems to me no useful purpose could be served by analyzing the methods used in obtaining same.

I will be glad to meet you at any time with the Attorney General, if you desire, and give you the fullest information we possess.

Yours truly,
(Signed) JOHN L. RICH."

"39640.

Assessment of Franchise of the Louisville & Nashville Railroad Company for 1913.

July 15, 1913.

Hon. H. M. Bosworth, Auditor of Public Accounts, Frankfort, Kentucky.

DEAR SIR: With reference to corrected statement issued from your office on June 28th, 1913, the tentative assessment of the value of the Franchise of this Company for taxes for 1913, it is our purpose to file with you a written protest and request for a change
439 and reduction of the valuation.

The tentative assessment, of which notice has been given, is, in our opinion, excessive, unreasonable, unjust, and illegal, and in order that we may be enabled to appear before the Board and introduce evidence showing specifically, fully, and intelligently the errors in calculations, valuations, and apportionments made by the Board in reaching said tentative assessment, and in order that we

may be afforded a full hearing, as contemplated by law, I request that you furnish me by return mail with a statement showing the principle on which the Board proceeded, or the mode or manner employed by it in estimating the value of the Company's franchise.

I understand on an attempt by one of this Company's representatives to ascertain by examination of the jacket or papers in your office pertaining to such assessments how the calculations were arrived at, he was informed that you had given instructions not to permit access to these papers by any agent or representative of the corporation assessed.

I have deemed it proper, therefore, to make the request on you for information in this respect as above set forth.

Very respectfully,
(Signed) W. A. COLSTON,
General Solicitor.

Copy to Mr. R. E. Fleming, Special Attorney."

"State of Kentucky,
Office Auditor of Public Accounts,
Frankfort.

July 17, 1913.

Hon. W. A. Colston, General Solicitor L. & N. R. R. Co., Louisville, Ky.

DEAR SIR: I have received your letter of July 15th, in reference to the tentative assessment of the value of the franchise of the Louisville and Nashville Railroad Company for taxes for the year of 1913, in which you state "on an attempt by one of this Company's
440 representatives to ascertain by examination of the jacket or papers in your office pertaining to such assessment how the calculations were arrived at, he was informed that you had given instructions not to permit access to these papers by any Agent or representative of the Corporations Assessed."

I beg to inform you that no such instructions were given by me to any one connected with my office, and now wish to advise you that "the records of my office are now and at all times during business hours available to any representative of your Company."

Mr. Robert E. Fleming, one of the Attorneys of your Company, has an engagement with the Attorney General and Mr. Rich of my office tomorrow, and I hope to be present, at which time we will be glad to give Mr. Fleming all the facts that were considered by the Board and the information before it when the tentative assessment of your Company was made.

In reply to your request that I furnish you by return mail with a statement showing the principle on which the Board proceeded, or the mode or manner employed by it in estimating the value of this Company's franchise, I beg to advise you that in arriving at the total value of the capital stock or assets of your Company, I considered the value of your outstand- shares of stock and bonds and capitalized the net income of your Company for the year on the basis of six per cent.

In estimating and determining the proportion thereof subject to taxation in Kentucky, I considered the ratio of operated mileage in Kentucky to the operated mileage within and without Kentucky and the ratio of the operated leased and controlled mileage in Kentucky to the operated leased and controlled mileage within and without Kentucky, and the ratio of gross and net earnings within Kentucky to the gross and net earnings within and without Kentucky as stated in your report to the Kentucky Railroad Commission for the year ending June 30, 1912.

The ratio of 'operated' and 'operated and controlled' mileage was obtained from the testimony of Mr. H. F. Thompson given
441 before the Board last year.

The corporate income of the Company was ascertained from the report of your Company to the Auditor made as of June 30, 1912, from the report of the directors of the Company to the stockholders of the same date, and from a publication issued by the Interstate Commerce Commission entitled, 'A preliminary Abstract of Statistics of Common Carriers for the year ended June 30th, 1912.'

Inasmuch as the assessment in question is merely tentative, and subject to change or correction if any injustice has been done, I am wholly unable to understand why you inquire with such particularity as to the mode or method employed by the Board in arriving at the assessment made.

Upon a hearing, which the Board must give your Company as to the correctness of this assessment, your representatives will be given a full opportunity to be heard and present all the facts relative to the value of your franchise and to fully express your views as to the mode or methods of ascertaining the value of same.

Very respectfully,

(Signed) H. M. BOSWORTH, *Auditor.*'

The Louisville & Nashville Railroad Company's answer to and protest against the tentative assessment of June 28th, 1913, filed with the Board of Valuation and Assessment on July 25th, 1913, was and is as follows, to-wit:

442 *Railroad's Protest Against Tentative Assessment of June 28, 1913.*

Before the Board of Valuation and Assessment of the State of Kentucky.

Protest and petition of the Louisville and Nashville Railroad Company for a change and reduction of the valuation of its franchise for taxation in the State of Kentucky for the year 1913.

Now comes petitioner, the Louisville & Nashville Railroad Company, by Henry L. Stone, William A. Colston, and Robert E. Fleming, its attorneys, and protests against the assessment of its franchise made by the Board of Valuation and Assessment of the State of

Kentucky for taxation for the year 1913, and asks a change and reduction of the valuation of said franchise, and says:

(1) That heretofore, to-wit: on the 30th day of June, 1913, petitioner received notice of the assessment of the value of its franchise in the State of Kentucky made by the State Board of Valuation and Assessment for the year 1913, in words and figures as follows, to-wit:

Corrected Statement.

State of Kentucky, Office of Auditor of Public Accounts.

FRANKFORT, Jun- 28, 1913.

To Louisville & Nashville R. R. Co., R. E. Fleming, Lou., Ky.

The State Board of Valuation and Assessment have had the report of the above corporation for June 30, 1912, for the taxes of 1913, under consideration, and have assessed the value of your Franchise as follows:

Capital stock	$76,000,000
Less amount of tangible property assessed by Assessor for State taxes	28,806,072
Value of franchise	47,193,928
Tax at 50 cents on each $100	235,968.64

Under the law you will have thirty days in which to appear before the Board, introduce evidence, and ask for a change in the assessment. Should the thirty days expire without a protest, this assessment becomes final.

Yours truly,

(Signed) H. M. BOSWORTH, *Auditor.*

Make checks payable to State Treasurer, but mail to this office.

443 (2) That said assessment of the value of petitioner's franchise in the State of Kentucky for taxation for the year 1913 is excessive, unreasonable, unjust, illegal, and arbitrary, as hereinafter shown.

Stock and Bonds.

The value of all of petitioner's property, both tangible and intangible, inside and outside of the State of Kentucky, to be used in assessing for taxation the valuation of petitioner's franchise in the State of Kentucky, cannot exceed the value of its bonded debt and of the shares of its capital stock, because, as was said by Mr. Justice Miller in the State Railroad Tax Cases, 92 U. S. 575, 605, it is obvious "that when you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented

by the value of its bonded debt and of the shares of its capital stock." The capital stock of the Louisville & Nashville Railroad Company, including original stock and subsequent stock dividends unissued, amounted for the year ended June 30, 1912, to $60,000,000.00 par value.

Its average market value for the year ended June 30, 1912, as shown by quotations on the New York Stock Exchange, which as a rule are in excess of real values, was $152.0825 per share of $100 par value, representing a total average market value of the shares of the capital stock of $91,249,500.00.

The outstanding bonded debt of the Louisville & Nashville Railroad Company as of June 30, 1912, was $136,078,500.00 and the average market value for the year ended June 30, 1912, of the bonds constituting this total was not exceeding ..... $135,785,792.84.

The total current or market value of the stocks and bonds was, therefore, not exceeding..... $227,035,292.84; but the petitioner states that no deductions whatever were made in arriving at the total value as above of all property, tangible and intangible, of petitioner, as ascertained on basis of current or market value of stocks and bonds, on account of petitioner's holdings in the securities of other properties separately assessed against their respective companies in the State of Kentucky, and states that the value of the said securities so held is..... $30,773,198.17, and deducting this amount from the aforesaid total of $227,035,292.84, leaves..... 196,262,094.67 as the greatest total value of all of petitioner's property, tangible and intangible, both inside and outside of Kentucky, which may possibly be used by said Board in arriving at the valuation for taxation of petitioner's franchise in Kentucky, on the basis of the value of its stocks and bonds.

444

A statement showing in detail the values of petitioner's holdings in securities of other companies so separately taxes in the State of Kentucky is marked "Exhibit A," and is attached hereto and is made a part hereof.

An apportionment on a mileage basis of the total value, thus treating each mile in and out of Kentucky as representing the same value of tangible property, without first deducting from the said value of petitioner's capital stock or entire property, the value of petitioner's entire tangible property, wherever situated, as it appears the Board did not do, would result in unlawfully bringing

into Kentucky for taxation as intangible property large values for terminal and other tangible property situated in other States, not taxable in this State.

Capitalization of Net Earnings or Income.

The total value of all of the property, tangible and intangible, of petitioner as arrived at by capitalization of petitioner's income is not more than ..... $248,560,152.65 arrived at as follows:

The total income of petitioner as shown
445 in Income Account, Table No. 1 of the Annual Report of petitioner to its stockholders, for the year ending June 30, 1912, was, before deducting charges against income, such as interest on bonded debt, and rents..... $17,159,550.82; but this amount includes items of income which are, in no sense, the income of the Louisville & Nashville Railroad Company, and are not applicable by that Company, or its directors, to the payment of interest on bonded debt, or to the payment of dividends on Petitioner's stock, or to any other account; to-wit;

This amount includes the gross and net earnings of the South & North Alabama Railroad Company, of the Glasgow Railway Company, of the Elkton & Guthrie Railroad Company, and of the Frankfort & Cincinnati Railway Company, whose lines were operated entirely for the account and benefit of their owners, and no part of the revenue, gross or net, from these lines represents in fact any of the net earnings or income of the Louisville & Nashville Railroad Company. The South & North Alabama Railroad Company is separately and entirely taxed, both as to tangible and franchise or intangible properties, in the State of Alabama, it being a domestic corporation of that State, wherein all its tangible property is situated, and its franchise is wholly and entirely exercised; and the Glasgow Railway Company, the Elkton & Guthrie Railroad Company, and the Frankfort & Cincinnati Railway Company are each and all separately and entirely taxes on all their properties, tangible and intangible, in the State of Kentucky. Eliminating results of operation of these roads from the Income Account shown in the Annual Report of the Louisville & Nashville Railroad Company (as must be done in order to ascertain the income of the Louisville

& Nashville Railroad Company), the total income corresponding to the item of $17,159,550.82 shown in said Annual Report is only..... $16,132,239.67;
but to this amount must be added the income from operation and income from securities
446 under the Georgia Railroad lease, which were credited directly to Profit and Loss Account, and which amounted to..... $68,911.08;
thereby resulting in income for the Petitioner for the year of ..... $16,201,150.75.

A statement explaining the difference between the income of $17,159,550.82, shown in Income Account, Table No. 1 of the Annual Report of the Louisville & Nashville Railroad Company to its stockholders, for the fiscal year ended June 30, 1912, and the income of $16,201,150.75, set forth above, is marked "Exhibit B," and is attached hereto and is made a part hereof.

It is not proper to capitalize this amount of income at as low a rate as 6 per cent., the legal rate of interest in the State of Kentucky, for two reasons: in the first place, railroad companies are entitled to earn upon the property devoted by them to the public use at least the same return demanded or expected by other companies or persons in enterprises having the same or a smaller amount of risk. Those engaging in enterprises having a smaller amount of risk than is encountered in the railroad business, in the territory traversed by the Louisville & Nashville Railroad Company's lines, expect and are entitled to at least 8 per cent return on the property devoted to the enterprises in which they are engaged. But even if it were proper to limit railroad companies to a return equal to the legal rates of interest in the States in which they do business, it must be remembered that in some of the States traversed by the lines of the Louisville & Nashville Railroad Company, the legal rate of interest is more than 6 per cent, to-wit: in the State of Georgia the legal rate of interest is 7 per cent; and in the States of Florida and Alamaba the legal rate of interest is 8 per cent; and the Circuit Court of the United States for the Middle District of Alamaba has held that railroad companies in that State are entitled to at least 8 per cent return upon the prop-
447 erty devoted by them to public use in that State. The composite per cent arrived at from a consideration of the mileage of lines operated, owned, leased, or controlled by Petitioner in the several states and of the legal

rates of interest in the several States traversed by Petitioner's lines is 6.518%

There is attached hereto and made a part hereof a statement marked "Exhibit D," showing in what manner this composite percentage has been arrived at.

Capitalizing the income of..... $16,201,150.75
at the composite percentage of..... 6.518 per cent
we ascertain that the total value of all of the property of petitioner, tangible and intangible, both in and out of the State of Kentucky, to be used in arriving at the valuation for taxation of Petitioner's franchise in Kentucky cannot be more than $248,560,152.65
and this amount includes the amount of..... 14,809,632.85
representing the capitalization of income accruing to petitioner from investments in securities of other companies separately taxed in the State of Kentucky, leaving as the greatest possible total value which may be used by said Board as income basis ..... $233,750,519.80.

A statement showing the detail of said amount of $14,809,632.85 is attached hereto marked "Exhibit C," and is prayed to be read as part hereof.

Apportionment on Mileage Basis.

The total length of the entire lines operated, owned, leased, or controlled by Petitioner in the State of Kentucky is..... 1,931.03 miles

The total length of the entire lines operated, owned, leased, or controlled by Petitioner elsewhere than in the State of Kentucky is..... 5,754.92 "

The total mileage operated, owned, leased, or controlled by Petitioner both within and without the State is ..... 7,685.95 "

448 of which the mileage operated, owned, leased, or controlled in the State of Kentucky is ..... 25.12415 per cent.

As between the entire values of the properties, tangible and intangible, of petitioner, both within and without the State of Kentucky, arrived at on basis of value of stocks and bonds..... $227,035,292.84
and as arrived at by capitalization of income.... 248,560,152.65,
taking the larger (which is a greater amount than should be taken for the purpose of arriving at the value of Petitioner's franchise for taxation, and without first deducting therefrom, as should be done, the value of all of Petitioner's tangible property situated inside and outside of this State), and applying 25.12415 per cent in order to ascertain

that porportion of the value of the capital stock or entire property which the length of the lines operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased or controlled in this State or elsewhere, as provided by Section 4081, Kentucky Statutes, the full value, 100 per cent, of the tangible and intangible property of Petitioner in the State of Kentucky is found to be not more than..... $62,448,625.60;
but this amount includes amount of..... 14,809,632.85
representing properties separately taxed in the State of Kentucky leaving as the full value of all properties, tangible and intangible, taxable against Petitioner in Kentucky ..... $47,638,992.75.
But the rule and custom in the assessment of other property, real and personal, within the State of Kentucky, for taxation is at a rate not more than 60 per cent of its real value, or its fair cash value, estimated at the price it would bring at a fair voluntary sale, and, therefore, even assuming as a basis the excessive value for taxation of
449 $47,638,992.75, shown above (resulting from the failure to first deduct from the value of Petitioner's entire capital stock or entire property, the value of all its tangible property, before apportioning to this State its share of the value of intangible property, it is apparent that the total property, tangible and intangible, of Petitioner in the State of Kentucky should not be assessed for taxes for the year 1913 at a greater amount than 60 per cent of $47,638,992.75, or... $28,583,395.65;
but as the amount of tangible property of petitioner assessed for State taxes is..... 28,806,072.00,
it is likewise apparent that the Petitioner's franchise in this State should not be assessed for taxes for the year 1913 at any amount whatever.

Even if the rule or custom in the assessment of property, real and personal, other than railroad property, for taxation in this State, were on an average at a rate (which it is not) as high as 80 per cent of its real value, or of its fair cash value estimated at the price it would bring at a fair voluntary sale, the total property, tangible and intangible, of petitioner in the State of Kentucky should not be assessed for taxes for the year 1913 at a greater amount than 80 per cent of $47,638,-992.75, or $38,111,194.20;
and deducting therefrom the assessed value of Petitioner's tangible property in this State..... 28,806,972.00,
the Petitioner's franchise or intangible property

in this State should not be assessed for taxes for the year 1913 at a greater valuation than..... 9,305,122.20.

The tangible property of Petitioner outside the State of Kentucky is worth at least..... $130,917,782.15,

450 as shown by the Report of the Louisville & Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30, 1912.

The tangible property assessed for taxation within the State of Kentucky is..... $28,806,072.00

The total tangible property within and without the State of Kentucky is, therefore, worth at least 159,723,854.15,

and deducting this amount of tangible property from the amounts of entire values of the property, tangible and intangible, of Petitioner, both within and without the State of Kentucky, after deducting values separately assessed in the State of Kentucky, arrived at on basis of stocks and bonds... 196,262,094.67,

and by capitalization of income..... 233,750,519.80

we have as the total amount of Petitioner's intangible property within and without the State of Kentucky, on basis of value of stocks and bonds 36,538,240.52,

and on basis of capitalization of income..... 74,026,665.65,

and applying 25.12415 per cent in order to ascertain the proportion of the entire intangible property which the length of the lines operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased, or controlled in this State or elsewhere, the full value, 100 per cent, of the intangible property of Petitioner in the State of Kentucky is found to be, on basis of value of stocks and bonds, not more than 25.12415 per cent of $36,538,240.52, or..... 9,179,922.36,

and on basis of capitalization of income not more than 25.12415 per cent of $74,026,665.65, or... 18,598,570.52.

But the rule and custom in the assessment of other property, real and personal, within the State of Kentucky for taxation is at a rate not more than 60 per cent of its real value, or of its fair

451 cash value estimated at the price it would bring at a fair voluntary sale, and the assessment of the intangible property of Petitioner for taxation in the State of Kentucky on the basis of value of stocks and bonds should not be more than 60 per cent of $9,179,922.36, or..... $5,507,953.42,

and on basis of capitalization of income said valuation of Petitioner's franchise for assessment should not be more than 60 per cent of $18,598,-570.52, or ..... $11,159,142.31.

Even if the rule or custom in the assessment of

property, real or personal, other than railroad property, for taxation in this State were on an average at a rate (which it is not) as high as 80 per cent of its real value, or of its fair cash value estimated at the price it would bring at a fair voluntary sale, Petitioner's franchise in the State of Kentucky should not be valued for taxation on the stock and bond basis at more than 80 per cent of $9,179,922.36, or $7,343,937.89,

and on basis of capitalization of income petitioner's intangible property or franchise in the State of Kentucky should not be valued for taxation at more than 80 per cent of $18,598,570.52, or ..... $14,878,856.42.

(3) The petitioner states that all calculations to fairly and reasonably ascertain the value of its franchise or intangible property taxable in Kentucky, either on the stock and bond plan or the capitalization of net earnings plan, should be based on the values and results of a period of at least five years, instead of those of only one year.

(4) The Board appears to have ignored the express provision of Section 4081, Kentucky Statutes, which declares "that proportion of the value of the capital stock (meaning all of the corporation's property, tangible and intangible, including its franchise) which the length of the lines operated, owned, leased, or controlled in
452 this State bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State," and failed to consider the same, but apparently, without power or authority of law so to do, proceeded upon an erroneous principle, and adopted an improper mode or manner of estimating the value of petitioner's franchise, in these respects, to-wit:

(*a*) By undertaking to value petitioner's entire capital stock or all of its property, tangible and intangible, including its franchise, upon some unreasonable plan not disclosed, and then apportioning to Kentucky, as its share of such total value, that proportion thereof which the mileage that said Board assumed to be the length of the lines operated by petitioner in this State bears to the mileage that said Board assumed to be the total length of the lines operated in this State and elsewhere, which resulted in erroneously making Kentucky's share $76,000,000, or practically one-third of such total value as computed by said Board.

(*b*) After obtaining this erroneous result, taking therefrom the assessed value of petitioner's tangible property in this State, $28,806,072, leaving the supposed value of petitioner's franchise in Kentucky $47,193,928, which is in excess of 396 percent of the amount which petitioner's franchise in this State was assessed at for the year 1911. (The final assessment, as fixed by the said Board of petitioner's franchise in Kentucky for the year 1912, is now in litigation).

The following table shows the amount of the final assessment of the petitioner's franchise in Kentucky, number of miles upon which the same was distributed for taxation, and the assessment per mile, for the five years, 1907 to 1911 inclusive, to-wit:

Year.	Total Franchise Assessment.	No. of Miles upon Which Distributed.	Assessment per Mile.
1907	$9,270,806	1,232.82	$7,520.00
1908	8,701,560	1,243.08	7,000.00
1909	8,891,050	1,270.15	7,000.00
1910	9,422,325	1,292.58	7,289.54
1911	11,899,200	1,487.40	8,000.00

453 (5) The petitioner states that if it were lawful for the said, Board to have proceeded upon the principle or to have adopted the mode or manner of estimating petitioner's franchise or intangible property in Kentucky as set out in paragraph (4) hereof, that is to say, on the basis of supposed operated mileage, then in capitalizing net earnings, if that was the plan said Board intended to pursue in reaching the value it placed on petitioner's entire capital stock or entire property, (tangible and intangible, including its franchise), the said Board should have excluded and deducted from the net earnings capitalized which it failed to do, the amount of the earnings or income received for the year ending June 30, 1912, by the petitioner from all of those lines which it owned, leased, or controlled, but which apparently were not embraced in the supposed operated mileage of the petitioner used or adopted by said Board. And in ascertaining stock and bond values, if that was the plan said Board intended to pursue in reaching the value it placed on petitioner's entire capital stock or entire property (tangible and intangible, including its franchise), the said Board should have excluded and deducted from the values of stocks and bonds, which it failed to do, the amount of stocks and bonds representing all of those lines which petitioner owned, leased or controlled, but which apparently were not embraced in the supposed operated mileage of the petitioner used or adopted by said Board.

If so-called "operated mileage" is used as a basis for division between Kentucky and other States of values arrived at by capitalization of income, then in addition to the elimination of items which, as set forth in paragraph (2) hereof, must be deducted on account of the inclusion in Income Account in the Annual Report of the Louisville & Nashville Railroad Company of the gross and net earnings of the South & North Alabama Railroad Company, of the Glasgow Railway Company, of the Elkton & Guthrie Railroad Company, and of the Frankfort & Cincinnati Railway Company, whose lines were operated entirely for the account and benefit of their owners, and no part of the revenues, gross or net, from which lines represents in fact any of the net earnings or income of the Louisville & Nashville Railroad Company, and in addition to the deduction of that portion of its income accruing to the
454 Louisville & Nashville Railroad Company from investments in securities of properties separately assessed against their

respective companies in the State of Kentucky, there must be subtracted, for example, from the amount of petitioner's income shown in paragraph (2) hereof, the following item of income which is not embraced in the supposed operated mileage of the petitioner used or adopted by said Board, to-wit:

Income from operation and securities, Georgia Railroad and dependencies $75,550.08,

And if supposed or so-called "operated mileage" is used as a basis for dividing total values arrived at by the valuation of stocks and bonds, then there must be deducted from the total value of stocks and bonds, before apportioning on basis of such supposed or so-called "Operated mileage," the values of stocks and bonds which represent property not separately taxed in Kentucky and not embraced in the operated mileage used or adopted by said Board, or having a value greatly disproportionate to the amount of mileage represented thereby. For example:

Terminal Railroad Association property at St. Louis, petitioner's share, about	$2,451,000.00
Petitioner's undivided half interest in property of the Lessees of the Georgia Railroad, about	785,000.00
Terminals at Nashville, about	3,177,000.00
South & North Alabama Railroad, petitioner's share, about	11,167,000.00
Cairo & Thebes Railroad, about	1,691,000.00

And there are many other items of railroad and terminal property not embraced in the supposed or so-called "operated mileage" used or adopted by said Board, which are covered by and affect the value of petitioner's stocks and bonds, and which affect the franchises or intangible value of petitioner's property.

But petitioner states that it is not lawful for said Board to have proceeded upon the principle or to have adopted the mode or manner of estimating petitioner's franchise or intangible property in Kentucky as set out in paragraph (4) hereof, that is to say, on basis of supposed operated mileage, because the only authority which said Board has to value and assess petitioner's franchise or in-
455 tangible property is to be found in the Statutes of the State of Kentucky, and these statutes provide that in fixing the value of the corporate franchise that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State bears to the total length of the lines owned, leased or controlled in this State and elsewhere shall be considered. And petitioner states that even if it were not unlawful for said Board to have distributed values on basis of operated mileage alone, it is entirely inconsistent and unreasonable to make the distribution of values upon such a basis, and petitioner points out a few of the many inconsistencies and unreasonable results which would arise from such a distribution, to-wit:

(*a*) A distribution on basis of "operated mileage" would result

in charging to petitioner franchise or intangible values arising from the operation of the Elkton & Guthrie Railroad, the Glasgow Railway, the Frankfort & Cincinnati Railway, and the South & North Alabama Railroad, the operation of which railroads in no wise affects the value of petitioner's property, either tangible or intangible; and such a distribution would omit to take into account petitioner's property, tangible and intangible, resulting from the ownership and lease of property owned in fee by petitioner, such as the Paducah & Memphis Division, and the Clarksville & Princeton Branch between Gracey, Ky., and Princeton, Ky.,

(*b*) A distribution on operated mileage would improperly include the results of operation of the Elkton & Guthrie Railroad, the Glasgow Railway, the Frankfort & Cincinnati Railway, and the South & North Alabama Railroad, which do not affect either petitioner's income or the value of petitioner's stocks and bonds, and would exclude the mileage and operations of the Georgia Railroad and the Chicago, Indianapolis & Louisville Railway, the income from and operation of which properties directly and intimately affect petitioner's income and the values of its stocks and bonds.

(*c*) A distribution on "operated mileage" would result in taxing against petitioner values, tangible or intangible, or both tangible and intangible, for mileage separately taxed in the State of Kentucky.

456 (*d*) A distribution on "operated mileage" would result in bringing into the State of Kentucky for taxation, and in taxing against petitioner in Kentucky, properties, both tangible and intangible, of the South & North Alabama Railroad Company, the properties of which company, both tangible and intangible, are separately taxed in the State of Alabama, in which State its properties are all situated, and in which State alone it exercises its franchise.

(6) The petitioner states that the Board apparently failed to deduct from its estimate of the value of petitioner's entire capital stock or entire property (tangible and intangible, including its franchise), the value of petitioner's tangible property situated outside of the State of Kentucky, stated in its Annual Report to the Auditor of Public Accounts of the State of Kentucky, as of June 30, 1912, to be $130,917,782.15, and failed also, apparently, to deduct from such total value of petitioner's entire capital stock, the value of petitioner's tangible property in this State, assessed at $28,806,072, before undertaking to ascertain the share of the value of petitioner's franchise or intangible property apportionable to Kentucky, for taxation, and by such failure to make such deductions the said Board largely increased, without power or lawful authority so to do, such share apportionable to Kentucky, and included in the tentative assessment of the supposed franchise or intangible property of the petitioner, herein complained of, large values of tangible property located and situated outside of this State, not lawfully taxable therein under the guise of a franchise or as intangible property, or otherwise, the tangible property of petitioner, including terminals and other property, outside of this State being of greater value per mile than the assessed value of the tangible property of petitioner inside

this State. Thus the petitioner, should the said tentative assessment be allowed to become final, would be taxed in Kentucky on the value of a large and material part of its tangible property situated in other States and taxed there and would be thereby deprived of its property without due process of law, in violation of Section One of the Fourteenth Amendment of the Constitution of the United States.

457 (7) That the assessment of petitioner's franchise for taxes for 1913 by the Board of Valuation and Assessment was so evidently exorbitant, and so excessively, unreasonably, and unjustly prejudicial to petitioner, that petitioner, through its Special Attorney, requested, in writing, the Chief Clerk, Corporation Department, in the office of the Auditor of Public Accounts, which said Auditor is the Chairman of said Board, and which said Chief Clerk acts as Secretary of said Board, to give a statement showing the principle on which said Board proceeded, or the mode or manner employed by it of estimating the value of petitioner's franchise, stating that he had been unable, from the figures set forth in the Auditor's notice, or "corrected statement," to arrive at a conclusion as to how such an enormous increase over previous years in the assessment of petitioner's franchise had been reached upon any reasonable or lawful plan. And petitioner, through its agents and attorneys, has made efforts through examination of the papers or records of said Board, and otherwise, to ascertain in what manner said Board arrived at its results, in order that petitioner might point out the errors in the calculations and deductions made by said Board, and introduce evidence and have a fair investigation and hearings, as provided by Section 4083, Kentucky Statutes. But in reply to said written request, the said Chief Clerk, Corporation Department, in the office of the Auditor of Public Accounts, advised in writing, that there were no figures to give, that the ones that had been made were not complete, that they did not give all the items, that he was not certain as to the mileage used in the calculations made, and that the figures were merely arbitrary, and petitioner has been unable in any way to ascertain definitely and certainly how the exorbitant and unreasonable assessment made by said Board was arrived at. And petitioner says that by the refusal of said Auditor and the said Board to furnish information showing the principle on which said Board proceeded, or the mode or manner employed by it of estimating the value of petitioner's franchise, petitioner is left to conjecture, and deprived of that due process of law guaranteed by said provision of the Federal Constitution, as it cannot introduce evidence showing specifically, fully, and intelli-

458 gently the errors in the calculations, valuations, and apportionments made by said Board in reaching said tentative assessment, unless petitioner is informed of what property was valued and assessed by said Board, and how the valuations and assessments were arrived at.

Wherefore, petitioner prays that the Board of Valuation and Assessment furnish to it, or its counsel, information showing the principle on which said Board proceeded and the mode or manner employed by it of estimating the value of petitioner's franchise, and that

petitioner, at such time as may suit the convenience of said Board, the petitioner, and its counsel, be accorded an investigation and hearing, and be permitted to introduce evidence showing the errors which exist in the principle on which said Board proceeded, and in the methods or manner employed by it of estimating the value of petitioner's franchise, and that said Board change and reduce the preliminary valuation and assessment of petitioner's franchise for taxes for the year 1913, and for all other appropriate relief.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By HENRY L. STONE,
WILLIAM A. COLSTON,
ROBERT E. FLEMING,
Attorneys for Petitioner.

459 EXHIBIT "A."

Louisville and Nashville Railroad Company.

Statement Showing Detail of Items Deducted from Total Value of Stocks and Bonds of the Louisville & Nashville Rd. Co. on Account of Properties Separately Assessed for Taxation, in the State of Kentucky, as of June 30th, 1912.

Frankfort & Cincinnati Railway...	$498,907.31	
Wasioto & Black Mtn. Rd. Co.....	2,765,401.61	
Elkton & Guthrie Rd.....	15,175.00	
Lexington & Eastern Ry.....	6,991,145.35	
Kentucky Public Elevator Co.....	37,439.50	
Colossal Cavern Co.....	30,163.17	
Chicago, Indianapolis & Louisville R.	6,008,533.62	
Morganfield & Atlanta Rd.....	499,677.96	
Kentucky Highlands Ry.....	583,171.74	
Central Transfer Ry. & Storage Co...	11,354.65	
Madisonville, Hartford & Eastern Rd.	1,818,744.00	
Louisville, Henderson & St. Louis Ry.	519,788.73	
Nashville, Chattanooga & St. Louis Ry	6,597,525.25	
Lexington Union Station Co.....	25,000.00	
Paducah & Memphis Div.—Assessed to Nashville, Chattanooga & St. Louis Ry.	4,130,376.03	
Clarksville & Princeton Branch, assessed to Illinois Central Rd.....	240,794.25	
		$30,773,198.17

NOTE.—It will be noticed that the above total exceeds the amount reported to the Auditor of Public Accounts by $11,398.82, made up as follows:

There was omitted from report to said Auditor, on account of Additions and Betterments, to the Madisonville, Hartford & Eastern Railroad	$994.40
Morganfield and Atlanta Railroad	1,216.92
There were also omitted various items in connection with the operation of the Frankfort and Cincinnati Railway, amounting to	9,187.50

which at the time of making the said report had not been entered on the books.

(Here fllows Exhibit "B," marked page 460.)

460*a* EXHIBIT "C."

Louisville and Nashville Railroad Company.

Statement Showing Income Received from Securities in the Following Properties, Separately Taxed in the State of Kentucky.

Morganfield and Atlanta Railroad Company.....	$31,828.73
Wasioto and Black Mountain Railroad Company....	16,196.17
Madisonville, Hartford & Eastern Railroad Company	*43,398.38
Chicago, Indianapolis & Louisville Ry. Company....	236,830.12
Nashville, Chattanooga & St. Louis Ry. Company...	430,656.00
Lexington & Eastern Railway Company.....	70,953.33
Kentucky Public Elevator Company.....	1,680.00
Lexington Union Station Company.....	1,000.00
Central Transfer Railway & Storage Company.....	1,000.00
Paducah & Memphis Division.....	206,506.20
Clarksville & Princeton Division.....	12,039.70
	$965,291.87
and the amount of $965,291.87 capitalized at composite per cent. of 6.518.....	14,809,632.85

NOTE.—In report to the Auditor of Public Accounts for the year ended June 30th, 1912, the Income from Securities separately taxed in the State of Kentucky was shown as $949,100.70 instead of $965,291.87, as above, caused in part by erroneously omitting therefrom the Income from the Wasioto & Black Mountain Railroad Company of $16,196.17, and, further, by showing the deficit on Madisonville, Hartford and Eastern Railway to have been $43,398.38 instead of $43,393.38.

E. F. Y.

[* In red in copy.]

460*b* EXHIBIT "D."

Louisville and Nashville Railroad Company.

Statement Showing in What Manner the Composite Percentage of 6.518 Has Been Arrived at.

State.	Mileage.	Legal rate of interest.	Interest miles.
Alabama	1,562.25	8%	12,498.00
Florida	246.48	8%	1,971.84
Georgia	786.10	7%	5,502.70
Illinois	200.23	5%	1,001.15
Indiana	634.84	6%	3,809.04
Kentucky	1,992.45	6%	11,954.70
Louisiana	88.49	5%	442.45
Mississippi	543.43	6%	3,260.58
Missouri	2.75	6%	16.50
North Carolina	13.20	6%	79.20
Ohio	1.40	6%	8.40
Tennessee	1,791.69	6%	10,750.14
Virginia	84.52	6%	507.12
Total	7,947.83		51,801.82

Dividing Total Mileage 7,947.83 into Total Interest-Mileage, 51,801.82, gives a composite percentage of 6.518.

461 *Response by Board to Railroad's Protest.*

A response was made by the Board of Valuation and Assessment to said protest, which response is as follows:

"The Louisville & Nashville Railroad Company:

In response to the prayer of your protest filed before us as constituting the State Board of Valuation and Assessment, we beg to state to you that in arriving at the tentative assessment of your property for this year, we were not governed by any particular rules, as it was our intention to fix the value of your property approximately, and to go more into details in making the final assessment after hearing all the proof offered by you.

We beg to say, however, that we found your capital stock to be approximately $264,000,000, by capitalizing the net income of your road at six per cent. We apportioned to Kentucky that proportion of this sum which the operated mileage in Kentucky bears to the operated mileage in Kentucky and elsewhere, and found that by following this plan the value of the total capital stock in Kentucky would be approximately $90,000,000. We also found that the capital stock of the operated roads belonging to your company on the

stock and bond plan amounted to $226,000,000 in round numbers. After taking into consideration the roads in which your company owns a controlling interest, which roads are the Nashville, Chattanooga & St. Louis, the Chicago, Indianapolis & Louisville, the South & North Alabama, the Georgia Railroad and the Louisville, Henderson & St. Louis, we found, by referring to Poor's Manual, that the assets of these roads aggregate in round numbers $110,000,000, which, when added to the $226,000,000, gives the total capital stock of your road as of the value of $336,000,000 in round numbers, and we apportioned to Kentucky of this sum the proportion that the roads, operated, owned, leased and controlled in Kentucky bears to the roads owned, operated, leased and controlled in Kentucky and elsewhere, and found that this gave the value of the capital stock in Kentucky at approximately $85,000,000.

From these calculations, we were of the opinion that the
462 value of the capital stock of your company in Kentucky would be as much as $76,000,000, after making all necessary deductions and equalizing with other property assessed by this Board, and it was in this way and for this reason that we fixed the value of the capital stock of your company in Kentucky at $76,000,000 as a tentative assessment. This tentative assessment was made prior to the decision of Judge Cochran in the case involving the assessment of your company last year, and since his decision, we feel it incumbent upon us to follow as nearly as possible the principles which we think should be followed in assessing your road, and if we do that, it necessarily means that we must possibly depart to some extent from the figures submitted above.

We are of the opinion that in making the assessment in accordance with the opinion of Judge Cochran, that it might be done in the following manner: We will suppose for instance, that the total capital stock of your company is $264,000,000, and that the entire tangible property of your company is $177,000,000. If we should apportion the tangible property to Kentucky by taking the proportion that the lines owned, operated leased and controlled in Kentucky bears to the lines owned, operated, leased and controlled in Kentucky and elsewhere, we would find that the value of the tangible property apportioned to Kentucky would be, in round numbers, $44,250,000. Suppose that the Board should be of the opinion from the affidavit of Milton H. Smith, the President of your company, filed in the case of your company against Siler, late pending in the Federal Court for the Eastern District of Kentucky, that the tangible property belonging to your company in the State of Kentucky was of the value of $70,000,000, or suppose that we should come to the conclusion from any other reliable evidence, that the value of your tangible property in Kentucky is $70,000,000, we would find that in order to ascertain the proper amount of excess value in the tangible property in Kentucky, it would be necessary to subtract from the $70,000,000, the amount which was found by apportioning to Kentucky on the basis aforesaid, and we
463 would find that the excess value would be about $25,750,000, which, when added to the $44,250,000, would give a total

of $70,000,000 as the value of the tangible property of your Company in Kentucky.

Having found that the value of the tangible property in Kentucky belonging to your company is $70,000,000, it would then remain for us to find the value of your tangible property in Kentucky. If your total capital stock should be $264,000,000, and the value of your tangible property should be $177,000,000, it necessarily follows that the value of your intangible property would be $87,000,000, if we should apportion to Kentucky on the proportion that the lines owned, operated, leased or controlled in Kentucky bears to the lines owned, operated, leased and controlled in Kentucky and elsewhere, we would get approximately $22,000,000 as the value of the intangible property in Kentucky, which we would add to the $70,000,000, and in this way we would find the value of your capital stock in Kentucky to be $92,000,000. This amount would be increased a million or more dollars by figuring out the sum exactly. If we should follow literally Judge Cochran's opinion, we would take the percentage that the gross income in Kentucky bears to the gross income in Kentucky and elsewhere as the proper proportion between the value of the intangible property in Kentucky and elsewhere. If we should use this proportion, we would find that Kentucky's share of the intangible property is, in round numbers, $35,000,000, which when added to the $70,000,000 would give the total value of your property in this state as $105,000,000.

We have made these suggestions to you showing what we think will have much influence with us in making the final assessment, and to that end we expect you to furnish us full information as to the value of your tangible and intangible property in this state, and especially as to whether it has increased in value since 1905, or whether it has decreased, and if it has increased, we expect you to show us in what manner, and if it has decreased, we expect you to show us in what manner.

464 Trusting that these suggestions will aid you in properly presenting your side of this question to us, we beg to remain,

Yours truly,

H. M. BOSWORTH, *Auditor.*
THOS. S. RHEA, *Treasurer.*
C. F. CRECELIUS,
Secretary of State."

Tentative Assessment of Oct. 23, 1913.

Subsequently, to-wit: on October 23, 1913, the said Board made a second tentative assessment of said franchise for 1913, and notified the Railroad Company of the same, which assessment was as follows:

"State of Kentucky,
Office of Auditor of Public Accounts,
Frankfort, Kentucky.

October 23, 1913.

To Louisville & Nashville Railroad Company:

The State Board of Valuation and Assessment for the State of Kentucky begs to notify you that, after a consideration of your report to the Auditor of date June 30, 1912, for taxes for the year 1913, and after a consideration of other evidence hereinafter mentioned, we have fixed the capital stock of the Louisville & Nashville Railroad Company in Kentucky at the valuation of $76,000,000, and we have deducted therefrom the assessed value of your tangible property in Kentucky, to-wit, $28,806,072, which leaves the value of your franchise $47,193,928.

We beg to state to you that in making this tentative assessment of your property for said year, we were not governed by any particular rules, as it was our intention to fix the value of your property in this State approximately, and to go more into details in making the final assessment after hearing all of the proof that you had to offer, if any, and after a consideration of such other legal proof as might be brought before us.

We beg to state, however, that we found the net income of
465 your road to be approximately $15,840,000, which, by capitalizing same at six per cent gave us as the total value of your entire capital, $264,000,000. We apportioned to Kentucky that proportion of this sum which the operated mileage in Kentucky bears to the operated mileage in Kentucky and elsewhere, approximately 34 per cent, and found that by following this plan, the value of the total capital stock in Kentucky of your road would be approximately $90,000,000.

We also found on the stock and bond plan that the capital stock of the operated roads belonging to your company amounts to $226,000,000, in round numbers. We also ascertained that your company owns a controlling interest in the Nashville, Chattanooga & St. Louis Railway, the Chicago, Indianapolis & Louisville Railroad, the South & North Alabama Railroad, the Georgia Railroad, and the Louisville, Henderson & St. Louis Railroad, and by referring to Poor's Manual, we found that the total assets of these roads, in round numbers, amounts to $110,000,000, which, when added to the $226,000,000, gives the total capital stock of your road as of the value of $336,000,000, in round numbers, and we apportioned to Kentucky of this sum the proportion that the roads operated, owned, leased and controlled in Kentucky bears to the roads owned, operated, leased and controlled in Kentucky and elsewhere, which is about 25 per cent, and found that this gave us the value of the capital stock in Kentucky at approximately $85,000,000.

From these calculations, we were of the opinion that the value of the capital stock of your company in Kentucky would be as much as $76,000,000, after making all necessary deductions and after equalizing with other property in this State which is assessed by this

Board, and it was in this way and for this reason, that we fixed the value of the capital stock of your company in Kentucky at $76,000,000 as a tentative assessment.

This tentative assessment was made prior to the decision of Judge Cochran in the case involving the assessment of your com-
466 pany last year, and since his decision we feel it incumbent upon us to follow as nearly as possible the principles which he thinks should be followed in assessing your road.

Since giving you the original notice, you have appeared before us and entered a motion that the notice be quashed because same is not sufficient under the decision of Judge Cochran, and after consideration, we sustained your motion and quashed said notice, and since quashing said notice, we have again considered the same matters above referred to, and have arrived at the same conclusion that we arrived at at the time we gave you the original notice which was quashed. We have also attempted to follow the opinion of Judge Cochran in making this tentative assessment and before giving you this notice, and using as your total capital stock the valuation of $264,000,000, we have found that of this sum, according to your report to the Auditor, $177,000,000 is tangible property.

If we should apportion the tangible property to Kentucky by taking the proportion that the lines owned, leased, operated and controlled in Kentucky bears to the lines owned, operated, leased and controlled in Kentucky and elsewhere, or approximately 25 per cent, we would find that the value of the tangible property apportioned to Kentucky would be, in round numbers, $44,250,000.

The Board has given consideration to the affidavit of Milton H. Smith, the president of your company, filed in the case of your company against Siler and others, late pending in the Federal Court for the Eastern District of Kentucky, and have also given consideration to your report of the net income and gross income derived from business done in Kentucky, as shown by your report to the Railroad Commission of Kentucky as of date June 30, 1912, and we find that from a consideration of these matters, the value of your tangible property in Kentucky is as much as $70,000,000. Since we only obtained $44,250,000 by apportioning on the mileage basis above referred to, we find that by following this method the excess value of your tangible property in Kentucky is $25,750,000, which, when added to the $44,250,000, would give a total of $70,000,000 as the value of the tangible property of your company in Kentucky.

467 If $177,000,000 is the value of your total tangible property, and $264,000,000 is the value of your total property, it necessarily follows that your intangible property is of the value of $87,000,000. If we should apportion to Kentucky on the proportion that the lines owned, operated, leased or controlled in Kentucky bears to the lines owned, operated, leased and controlled in Kentucky and elsewhere, which is about 25 per cent, we would obtain approximately $22,000,000 as the value of the intangible property in Kentucky, which, when added to the $70,000,000, the value of the tangible property, would give as the value of your capital

stock in Kentucky the sum of $92,000,000, which sum would be increased by a million or more dollars by using the exact proportions instead of the approximate proportions.

If we should follow literally Judge Cochran's opinion, we would take the percentage that the gross income in Kentucky bears to the gross income in Kentucky and elsewhere, as the proper proportion between the value of the intangile property in Kentucky and elsewhere, which is approximately about 40 per cent, and using this proportion, we would find that Kentucky's share of the intangible property is in round numbers, $35,000,000, which, when added to the $70,000,000 would give the total value of your property in this State as $105,000,000.

We beg to advise you that it was from a consideration of these matters mentioned that led us to fix the value of your total capital stock in Kentucky at $76,000,000, and in doing so we considered that we had made all necessary deductions, and that we had equalized your property so that it was not assessed any higher for taxation than other property assessed by this Board, and we also beg to suggest to you that these things will have much influence with us in making the final assessment, and to this end we expect you to show us upon final hearing whether or not we have your net income correctly stated, and whether the value of your property in this State has increased or decreased since the year 1905, and if it has decreased or increased, we shall expect you to show us
468 in what respect, and to what amount. We shall also expect you to show us the value of the assets of the road which are controlled by you, as well as any other information that will aid us in giving proper consideration to the assessment of your property.

In conclusion, we beg to state that the State Board of Valuation and Assessment has had the report of your corporation for June 30, 1912, for the taxes of 1913, under consideration, and has assessed the value of your franchise as follows:

Capital Stock	$76,000,000
Less amount of tangible property assessed for taxes in this State	28,806,072
Value of franchise	47,193,928
Tax at 50 cents on each $100	$235,968.64

Under the law you will have thirty days in which to appear before the Board to introduce evidence and ask for a change in the assessment. Should the thirty days expire without protest, this assessment becomes final.

Yours truly,

H. M. BOSWORTH, *Auditor.*

Make checks payable to State Treasurer, but mail to this office."

After defendant had been notified of said second tentative assessment, the Louisville & Nashville Railroad Company, which will hereafter be referred to simply as "the Railroad Company," through its General Counsel, wrote to the then Auditor of the State, H. M. Bosworth, a letter dated November 14, 1913, enclosing a protest and petition responsive to said second tentative assessment which letter and which protest and petition are as follows, to-wit:

Letter from General Counsel of Railroad.

LOUISVILLE, KY., November 14, 1913.

Hon. H. M. Bosworth, Auditor, Frankfort, Ky.

DEAR SIR: Herewith I send you the protest and petition, which you will please mark filed, of this Company against the tentative assessment made by the Board of Valuation and Assessment
469 on the 23rd ult.

Your attention is called to the interrogatories embodied therein, beginning on page 2 and ending on page 4 thereof, calling for certain information which is deemed material at the hearing accorded to this Company and set for Monday, the 17th inst., in order that you may have the information ready, if practicable, at that time before this Company by its representatives shall proceed to introduce its evidence.

Messrs. Colston and Fleming and I expect to go up on the C. & O. and reach the Board's room about 11 A. M. on Monday next.

Respectfully yours,

H. L. STONE,
General Counsel."

470 *Railroad's Protest Against Tentative Assessment of Oct. 23, 1913.*

Before the Board of Valuation and Assessment of the State of Kentucky.

Protest and Petition of the Louisville & Nashville Railroad Company for a Change and Reduction of the Valuation of its Franchise for Taxation in the State of Kentucky for the year 1913, as Shown by the Second Tentative Assessment of the Board Made October 23rd, 1913.

Now comes the petitioner, Louisville & Nashville Railroad Company, by Henry L. Stone, William A. Colston, and Robert E. Fleming its Attorneys, and protests against the assessment of its franchise made by the Board of Valuation and Assessment of the State of Kentucky for taxation for the year 1913, as appears from the notice of such assessment given by H. M. Bosworth, Auditor to-wit: under date of October 23rd, 1913, and asks a change and reduction of the valuation of said franchise and says:

1. That the assessment now complained of is the same as the assessment heretofore made under date of June 28th, 1913, previously complained of in protest and petition filed by this petitioner; that in said assessment of June 28th, 1913, the values of petitioner's capital stock, tangible property assessed by assessor for State taxes, and franchise, and the amount of tax at 50 cents on each One Hundred Dollars of the franchise were shown as follows:

Capital Stock	$76,000,000.00
Less amount of tangible property assessed by assessor for State Taxes	28,806,072.00
Value of Franchise	47,193,928.00
Tax at 50 cents on each $100.00	235,968.64

And the values and amount of taxes at 50 cents on each $100.00, as shown by the notice of October 23, 1913, were as follows:

471 Capital Stock	$76,000,000.00
Less amount of tangible property assessed for taxes in this State	28,806,072.00
Value of Franchise	47,193,928.00
Tax at 50 cents on each $100.00	235,968.64

That there is nothing in the second tentative notice of assessment to-wit: of October 23rd, 1913, to show what mode or method, plan or principle was used or adopted by the Board in arriving at the assessment of petitioner's franchise just as there was nothing to indicate this fact either in the tentative assessment dated June 28th 1913, or in any of the files or records of the Board respecting the assessment.

And petitioner says that, by reason of the failure and refusal of the Board to furnish the information showing the principle upon which the Board proceeded, or the mode or manner employed by it for estimating the value of petitioner's franchise, petitioner is left to conjecture and cannot introduce evidence showing specifically, fully, and intelligently the errors in the calculations, valuations and apportionments made by the Board in reaching said tentative assessment, unless and until petitioner is informed of what property was valued and assessed by the Board and how the valuations and assessments were arrived at.

And, in order that it may have such notice of the fixing of the values of its franchise by the Board as will enable a full, intelligent, and effectual production of evidence and a hearing such as is contemplated by the Kentucky Statutes, petitioner asks that, before it be required to go on *which* such hearing, the Board of Valuation and Assessment furnish to it or its Conusel, information showing definitely the principle on which the Board proceeded and showing definitely the mode or manner employed by it of estimating the value of petitioner's franchise, and that the Board furnish petitioner

or its Counsel before said hearing definite answers to the following inquiries, to-wit:

(*a*) Was the value of the total capital stock or entire property, tangible and intangible, in this State and elsewhere of the Louisville & Nashville Railroad Company arrived at by the Board in
472 making its assessment on the stock and bond plan; that is to say, by taking the par or market value of the number of shares of stock and the par or market value of the total amount of the funded debt or mortgage bonds of that Company issued and outstanding as of June 30th, 1912, or as of any other date?

(*b*) If the stock and bond plan was used, state the value fixed on such stock and how the same was arrived at and as of what date?

(*c*) If the stock and bond plan was used, state the par or market value placed on such funded debt or mortgage bonds and as of what date, and state what value was used, if any other value than the par or market value was used?

(*d*) State the total value arrived at on such stock and bond plan?

(*e*) Was the total value of the capital stock or property, tangible and intangible, in this State and elsewhere of the Louisville & Nashville Railroad Company arrived at in making the assessment on the capitalization of net earnings plan?

(*f*) If so, state the amount of net earnings used in such capitalization and what items were taken and used to make up the same?

(*g*) Was the amount of net earnings used and employed in such capitalization intended to represent the net earnings or net income for the year ending June 30th, 1912, alone, or the average net earnings for a longer period than one year? If so, for what period and what are the amounts used for that purpose for each year and what was the average net earnings capitalized?

(*h*) At what rate or percentage was the amount of net earnings capitalized?

(*i*) What amount was thus obtained?

(*j*) On what basis was the total value of the capital stock or of the entire value of all the property of the Louisville & Nashville Railroad Company, tangible and intangible, apportioned to the State of Kentucky?

(*k*) What percentage was used and how was that percentage arrived at in apportioning to this State a share of the value of the entire capital stock or total value of property of that Company, tangible and intangible?

(*l*) If such apportionment was made on a mileage basis, was the same on basis of operated mileage alone inside and outside of this State? State the number of miles so used outside and the number of miles used inside this State for that purpose?

(*m*) Was, or not, the value of the tangible property of the Company located outside and inside this State ascertained and deducted from the total value of the capital stock or entire property before such apportionment to this State?

(*n*) Was or was not the total mileage operated, owned, leased, or controlled by the Louisville & Nashville Railroad Company inside

and outside of this State used in fixing the value of the corporate franchise of that Company liable for taxation in this State?

(*o*) If such mileage was so used, state the number of miles operated, owned, leased or controlled in this State and the total number of miles operated, owned, leased or controlled in this State and elsewhere so used or considered in ascertaining and apportioning to this State its share of the total value of the capital stock or entire property, tangible and intangible, of said Company and what percentage of such total value was apportioned to this State?

473 (*p*) Please furnish a statement or copy showing the figures and calculations whereby the amount or share of the value of the total capital stock or entire property, tangible and intangible, was apportioned to the State of Kentucky in making or fixing the assessment of the franchise of the Louisville & Nashville Railroad Company in this State?

(*q*) Please furnish a statement or copy showing the figures and calculations whereby the amounts of the capital stock or entire property, tangible and intangible, of the Louisville & Nashville Railroad Company in the State of Kentucky, was arrived at in making or fixing said assessment of the franchises of said Company?

(*r*) State what evidence besides the report made to the Auditor by the Louisville & Nashville Railroad Company as of June 30th, 1912, as the basis for the assessment of its franchise for 1913, was used or considered by the Board of Valuation and Assessment in making the tentative assessment of the Louisville & Nashville Railroad Company's franchise as per notice from the Auditor dated June 28th, 1913, and if any other reports or records were considered, say what parts of those records and reports were considered and what calculations were made upon the basis of such evidence?

(*s*) Please furnish a statement of the calculations showing from beginning to end how the valuation of petitioner's franchise was arrived at including the ascertainment of the total value of petitioner's capital stock, or the value of petitioner's property, tangible and intangible wherever situated any adjustments or equalizations of or deductions from such values which were or are made, apportionment of such total value, or of the amount remaining from such total value after equalizations, adjustments, or deductions to the State of Kentucky; equalizations, if any made, or deductions, if any made, from the part of the value apportioned to Kentucky, and all other calculations used in process of arriving at assessment made of the value of petitioner's franchise.

2. Petitioner says that the assessment made of the value of its franchise in the State of Kentucky for taxation for the year 1913, is excessive, unreasonable, unjust, illegal, and arbitrary, and that petitioner's franchise should not be assessed for taxation for the year 1913 in the State of Kentucky at a greater amount than..... $2,569,586.31, as shown by the following facts; and calculations:

The total average market value of the shares of petitioner's capital stock (which was of par value

of $60,000,000.00) for the fiscal year ended June 30th, 1912, was not in excess of..... 91,249,500.00.

The average market value of all of petitioner's bonds outstanding as of June 30th, 1912, (of par value of (136,078,500.00) was during
474 the fiscal year ended June 30th, 1912, not over ..... $135,785,792.84.

The average market value during the fiscal year ended June 30th, 1912, of petitioner's total capital stock and bonds outstanding as of June 30, 1912, was not over..... 227,035,292.84.

And as was said by the Supreme Court of the United States in the State Railroad Tax Cases, 92 U. S., 575, it is obvious, with respect to assessment of franchise values for taxation, that when you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have by the action of those, who, above all others, can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises. For these are all represented by the value of its bonded debt and of the shares of its capital stock.

But this total value of $227,035,292.84, includes the values of stocks owned by petitioner in Companies which are separately taxed in the State of Kentucky, and which are required to report and pay taxes upon their corporate franchises and which do pay taxes on their corporate property and franchises as provided by Kentucky Statutes, the values of which stocks amount to... $30,761,799.35.

Petitioner claims that these values should be deducted altogether from the Kentucky proportion of the value of its entire capital stock, and that if the deduction is made from total values within and without Kentucky before apportioning to Kentucky its proper share of all values, petitioner does not obtain the full benefit
475 of the deductions to which it is entitled.

But even making the deduction before apportionment, there remains as the value of the entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company within and without the State of Kentucky, which can be properly considered by this Board in fixing the value of complainant's total properties for taxation in the State of Kentucky not more than.... $196,273,493.49.

Petitioner's tangible property outside of the State of Kentucky is worth..... $130,917,782.15.

And petitioner says that the assessment of property for taxation in Kentucky generally and in

the parts of Kentucky in which petitioner's lines are situated, is at a rate not in excess of 60 per cent of its real valuation, and that upon the assumption that the assessment of petitioner's tangible property in the State of Kentucky for the year 1912, ($28,809,072.00, not including property separately taxed) is 60 per cent of its real value, the value of petitioner's tangible property in the State of Kentucky, not including property separately taxed is $48,010,120.00,

and the value of petitioner's tangible properties, both within and without the State of Kentucky is at least $178,927,902.15,

leaving as the value of petitioner's franchise or intangible property, both within and without the State of Kentucky ..... 17,345,591.34.

476 The proportion which the mileage operated, owned, leased or controlled by the petitioner in the State of Kentucky bears to the total mileage owned, leased, operated or controlled within and without the State of Kentucky is.... 24.6901 per cent,

and 100 per cent or full valuation of Kentucky's proportion of petitioner's franchise or intangible values within and without Kentucky is..... $4,282,643.85.

But property in the State of Kentucky is generally intentionally, habitually and systematically assessed at not more than 60 per cent of its full value, and petitioner is entitled to have its property equalized and assessed for taxation so as to put it on an equality with other taxpayers, and the value of petitioner's franchise for taxation in the State of Kentucky for the year 1913, is, therefore, not more than 60 per cent on $4,282,643.85, or 2,569,586.31

3. Petitioner denies the right or power of this Honorable Body to consider in the assessment of the value of its franchise for taxation any facts, figures, or circumstances not embraced in the report made to the Auditor for the purpose of determining the value of its franchise in accordance with Section 4078, Kentucky Statutes. And with respect to certain other evidence stated in the notice of October 23rd, 1913, to have been considered by the Board, petitioner points out the following as some but not all of the objections to the consideration of such other evidence.

Complainant does not keep the books of the Nashville, Chattanooga & St. Louis Railroad, of the Chicago, Indianapolis & Louisville Railroad, or of the Louisville, Henderson & St. Louis Railroad, and cannot state what are the total assets of those roads.

477 and petitioner says that the general balance sheets or statements of total assets of such roads which may appear in Poor's Manual or in any other similar publication are unreliable

for the purpose for which the Board has attempted to use them, just as statements of petitioner's general balance sheet or statement of total assets made up in accordance with the requirement of the Interstate Commerce Commission is unreliable for the purpose of arriving at the full value of petitioner's property, tangible and intangible, wherever situated, or for fixing the value of petitioner's franchise. Some of the reasons why such general balance sheet statements or statements of total assets are unreliable are the fact that contingent assets and liabilities are frequently shown which are not real assets or liabilities, as such terms are usually understood, and there is frequently a duplication of assets in Property Investment Account, resulting from the inclusion of the same amounts both in the Road and Equipment and in Securities, representing unissued stocks, bonds, or other muniments of title placed upon such road and equipment.

Petitioner says further that an attempt to tax it for either a part or all of the properties of the Nashville, Chattanooga & St. Louis Railroad, the Chicago, Indianapolis & Louisville Railroad, the South and North Alabama Railroad, Georgia Railroad, or the Louisville, Henderson & St. Louis Railroad, which are not included in this petitioner's own values, would be an attempt to tax petitioner for the properties of other persons or corporations and would be unreasonable and unlawful on that account.

Petitioner further says that even if it be proper to consider the total values of the Nashville, Chattanooga & St. Louis Railroad, the Chicago, Indianapolis & Louisville Railroad, and the Louisville, Henderson & St. Louis Railroad, in arriving at the total value of petitioner's property, tangible and intangible, wherever situated, the total values of these other railroads must, in arriving at the values of petitioner's franchise for taxation in the State of Kentucky,
478 be deducted from the proportion of total values assigned to the State of Kentucky, because these other railroads are required by the revenue and taxation laws of the State of Kentucky to report and pay taxes upon their corporate franchises in this State, and these other railroads do pay their taxes on their corporate properties and franchises as provided by the laws of the State of Kentucky, and unless the values of these railroads are deducted as aforesaid an assessment without such deduction will necessarily result in double taxation and be, therefore, unreasonable and unlawful.

And petitioner further says that the inclusion of the total assets of the Nashville, Chattanooga & St. Louis Railroad, Chicago, Indianapolis & Louisville Railroad, the South and North Alabama Railroad, the Georgia Railroad, and the Louisville, Henderson & St. Louis Railroad in addition to the total assets of petitioner, would necessarily result in double taxation, because there are already included in the total assets of petitioner those parts of the total assets of these other railroads which are represented by petitioner's interest in them.

4. Petitioner says that this Honorable Board has no authority or jurisdiction to assess or to value or to adjust an assessment of valuation of its tangible properties in the State of Kentucky, and was,

and is, without authority to consider the affidavit of Mr. M. H. Smith, or any other evidence relating to the physical valuation of petitioner's railroads for the purpose of fixing the value of petitioner's tangible property in Kentucky. Petitioner says that, under the laws of the State of Kentucky, it is for the Railroad Commission alone to correct and equalize valuations of the tangible properties of railroads in the State of Kentucky, and that the authority of the State Board of Valuation and Assessment is limited to the valuation and assessment of the franchise or intangible properties.

5. Petitioner further says that the consideration of lines owned, leased, operated, and controlled, stated in the tentative assessment of October 23rd, 1913, to have been given by the Board, is, in substance and effect, no consideration at all. Under the circumstances stated in said notice such consideration could have
479 no effect whatever upon the result. Under the circumstances stated in said notice, the value of $70,000,000.00 would have been found by the Board as the value of petitioner's tangible property in the State of Kentucky whatever might have been the proportions of lines owned, leased, operated, or controlled in Kentucky and elsewhere.

6. Petitioner further says that there are no facts shown by the evidence stated to have been considered by the Board, and there are no facts at all showing or tending to show that on the stock and bond plan or on any other plan the value of the capital stock of the *the* "operated roads belonging" to petitioner is in so large an amount as $226,000,000.00. Petitioner says that on the stock and bond plan, the value of the capital stock pertaining to the roads operated by petitioner, whether belonging to petitioner or not, is a very much smaller amount than $226,000,000.00.

7. Petitioner further says that, in making the tentative assessment set forth in the notice of October 23rd, 1913, the Board has not followed the opinion of Judge Cochran, and petitioner further says in this regard that the Board has not followed the opinion of Judge Cochran, with respect to giving notice of the calculations made by the Board or of the method or plan pursued by the Board in making its assessment.

8. Petitioner denies the right or authority of this Honorable Board to consider the report of net income and gross income derived from business done in Kentucky, as shown by petitioner's report to the Railroad Commission of Kentucky as of date June 30th, 1912, or by any other report. And petitioner says that said report to the Railroad Commission of Kentucky for the year ending June 30th, 1912, is of no value for arriving at the value of or for assessing either petitioner's tangible property or petitioner's intangible property for taxation within the State of Kentucky.

9. Petitioner denies that Judge Cochran's opinion provides either literally or in substance or effect for the distribution of
480 property values, either tangible or intangible, between Kentucky and other states upon the basis of income, either gross or net. And petitioner says that no such distribution is contemplated by the laws of the State of Kentucky with reference to the assess-

ment of the intangible properties or franchises of railroad corporations, operating along definite and fixed lines in and out of this State.

10. The Board failed to deduct, as it should have done, the value of all the petitioner's tangible property wherever situated, both in Kentucky and out of Kentucky, from the total value ascertained by the Board of its capital stock or its entire property, tangible and intangible, before apportioning to Kentucky its share for taxation of petitioner's intangible property or franchise, and the Board by the method it pursued in ascertaining the value of petitioner's intangible property or franchise for taxation in Kentucky for the year 1913 imported the value of petitioner's tangible property situated in States outside of Kentucky of the value of many millions of dollars and included the same in its alleged valuation and assessment of petitioner's intangible property in Kentucky.

11. The Board failed to deduct the value of the tangible property in Kentucky as ascertained by the Board from the share of the total capital stock or the value of petitioner's entire property, tangible and intangible, in Kentucky, in ascertaining the value of the intangible property of petitioner in Kentucky, but deducted therefrom only the assessed value by the Railroad Commission of petitioner's tangible property in Kentucky made in 1912, thus leaving a large part of the value of petitioner's tangible property in Kentucky as ascertained by the Board, towit: $41,193,928, or the difference between $28,806,072 and $70,000,000, as fixed by the Board as the value of petitioner's tangible property in Kentucky as of June 30, 1912, as admitted by the Board and set forth in its notice to petitioner dated October 23, 1913, which sum of $41,193,928 was by the action of said Board as aforesaid unlawfully included in and made to form a part of the value as fixed by said Board of the intangible property of the petitioner in Kentucky as of June 30, 1912, for taxation in 1913, which method of valuation and
481 assessment by said Board resulted in a plain and manifest attempt on its part, without warrant of law, to assess and tax the same tangible property of petitioner in Kentucky twice (first by the Railroad Commission and second by the Board of Valuation and Assessment) or in a double valuation and assessment and double taxation to the extent of $41,193,928, included in said Board's assessment of petitioner's franchise.

12. The Board admits by its said notice to petitioner dated October 23, 1913, that its valuation of all its intangible property in this State and out of this State is only $87,000,000, and the apportionment thereof to Kentucky on the mileage basis, is approximately only $22,000,000 in Kentucky, whereas it has, without warrant of law, as set forth in its said notice, fixed and assessed the intangible property of petitioner in Kentucky at $47,193,928, or many times greater than its real or fair cash value, estimated at what it would bring at a fair voluntary sale.

13. The petitioner states the Board did not as it claims in its said notice of October 23, 1913, to have done, make all or any necessary deductions from its valuation of petitioner's total capital

stock or in its apportionment thereof to Kentucky, for the value of petitioner's non-taxable stocks in other corporations which have paid all taxes due from them or assessable against them upon their property located in the State of Kentucky, whether that property be realty, personalty, tangible or intangible, or franchise in nature, to which deductions the petitioner was and is entitled under the laws of this State, as decided by the Court of Appeals in the case of Commonwealth v. Fidelity Trust Co., 147 Ky. 77, and the value of which non-taxable stocks as hereinabove set forth was and is $30,781,799.35.

14. The said Board did not, as it claims to have done in its said notice to this petitioner of October 23, 1913, equalize the property, tangible or intangible, of this Company in Kentucky so that it was not or would not be assessed by said Board any higher for
482 taxation than other property assessed by said Board or by the county assessors, the boards of county supervisors or the State Board of Equalization. On the contrary, the said Board has for the years 1912 and 1913 intentionally, habitually and purposely valued and assessed the intangible property or franchises of other public service corporations in this State at not exceeding 60% of the real or fair cash value (estimated at the price the same would bring at a fair voluntary sale), and said county assessors, boards of county supervisors and State Board of Equalization have intentionally, habitually and systematically valued and assessed farm lands, city and town lots and improvements thereon, as well as other property assessable by said officials and boards, for taxation in 1913 and many years prior thereto at not exceeding 60% of the real or fair cash value thereof (estimated at the price the same would bring at a fair voluntary sale), all of which was well known to said Board, and was and is in violation of the equal protection clause of Section 1 of the 14th Amendment to the Constitution of the United States.

The value of the classes of property assessable as aforesaid by the county assessors, boards of county supervisors and the State Board of Equalization constituted (even at said low assessments thereof) in 1912, for the taxes of 1913 and for many years prior thereto at least 80% of the entire taxable property, tangible and intangible, in the State of Kentucky.

Wherefore, petitioner prays that the Board of Valuation and Assessment furnish to it or to its Counsel information showing the principle upon which said Board proceeded and the mode or manner employed by it of estimating the value of petitioner's franchise, together with the details of the calculations involved in such estimate and assessment.

Petitioner further prays that a reasonable time be set after such information has been furnished to petitioner, and that petitioner, and its Counsel, after the furnishing of such information, be accorded an investigation and hearing and be permitted to
483 introduce evidence showing the errors which exist in the principles on which the Board proceeded, and in the calculations made by the Board in this regard, and in the method or manner employed by it in estimating the value of petitioner's

franchise, and that said Board change and reduce the preliminary valuation and assessment of petitioner's franchise for taxation for the year 1913, and for all other appropriate relief.

LOUISVILLE & NASHVILLE
RAILROAD COMPANY,
By WILLIAM A. COLSTON,
ROBERT E. FLEMING,
HENRY L. STONE,
Attorneys for Petitioner."

484 To the letter enclosing said protest and petition, the Auditor responded to the General Counsel of the Railroad Company in a letter dated November 7, 1913, as follows; to-wit:

Response of Auditor to General Counsel.

"State of Kentucky,
Office Auditor of Public Accounts,
Frankfort.

November 17, 1913.

Colonel Henry L. Stone, General Counsel, L. & N. R. R. Co.

DEAR SIR: Your letter dated November 14, 1913, was on my desk when I reached my office this morning. It probably reached my office on Saturday November 15, but the 16th being Sunday, I was not in the Capitol Building and did not have an opportunity to see your letter.

On October 23, the Board of Valuation and Assessment furnished you what it considered a full and complete statement of the action of the Board in making the tentative assessment of the franchise of the Louisville & Nashville Railroad. Therefore, more than twenty days have intervened between the mailing of the statement to you by the Board, and the date of your letter which reached me only in time to complete its read- by the hour set for the hearing of the complaint against the tentative assessment of the L. & N. Railroad, and without giving me time to submit it to the other members of the Board.

I am unable to understand why you delayed until the last minute to submit to me a statement requesting answers to questions beginning at A. to and including S, which would require considerable time to answer.

Under date of —, 1913, I received from Colonel Colston a letter requesting certain information which will be shown by that letter, *requesting certain information which will be shown by that letter,* to which I replied inviting your representative to come to Frankfort with the promise that I would have all the information furnished to him.

485 On the — day of 1913, your Mr. Robert E. Fleming, who is the same person that signed the statement with you as one of your attorneys, did come to Frankfort, and at my request a con-

ference was held between he, Mr. John L. Rich and Attorney General James Garnett, in which I am informed Mr. Rich undertook to furnish him all the information desired.

Thereafter, on October 23, you again complained that you hadn't received sufficient notice, and by agreement the hearing was adjourned until this day, and I immediately caused a notice to be prepared which was mailed to you, giving you full details as to how the Board of Valuation and Assessment arrived at the Tentative Valuation of the franchise of the Louisville & Nashville Railroad Company.

By continuously working from now until tomorrow morning, I think I can prepare a statement answering your long list of questions, which I shall be glad to do if this statement will in any way aid you. I am unwilling to allow this statement to cause a delay in the hearing, because this matter has already been delayed too long, but if you insist upon this statement, advise me at once and I will continue the hearing until tomorrow morning at 10 o'clock, at which time I will furnish you the statement.

In the meantime, you will please furnish to the Board a statement giving the name of the corporation in which the $30,781,779.35 of stock, as stated in paragraph 13 of your statement, is held, the number of certificates, the par value of the shares of stock, the location of the corporation, the market value of the stock, so that the Board will be able to determine whether or not the L. & N. Railroad Company is the owner of $30,781,779.35 of stock in foreign corporations which have paid taxes to the State of Kentucky, and which stock would be exempt from taxation under the opinion of the Court of Appeals in the case of Commonwealth against Fidelity Trust Company, 147 Kentucky, 77. You will please have this statement ready to deliver to the Board tomorrow morning at 10 o'clock if you desire the hearing continued until that time, so that I may give you the information you desire.

486 I will also ask you to advise the Board as to whether or not Mr. Fleming informed you of the conference which he had with Mr. Rich and the Attorney General, and whether or not you, or any one for your company, received a copy of the resolution passed by the Board of Valuation and Assessment at the time it made the tentative assessment, and whether or not you received the statement prepared immediately after you were here on the 23rd of October, which statement sets out in detail how the Board arrived at the Tentative valuation of your franchise.

Awaiting your reply as to whether or not you desire this hearing continued until tomorrow morning so that I can furnish you the information, and you in turn can furnish the Board the information, I am,

Yours truly,

H. M. BOSWORTH, *Auditor.*"

Testimony of Robert E. Fleming.

Robert E. Fleming, called as a witness on behalf of the Railroad Company before the Board of Valuation and Assessment, testified in substance, that, after the correspondence had taken place, which has heretofore been set forth herein, he visited Frankfort, the Capitol of the State, and thereafter made a report to the General Solicitor of the Railroad Company, which report truly sets forth the facts therein stated, and which was and is as follows:

"Louisville & Nashville Railroad Company,
Law Department for Kentucky.

Robert E. Fleming, Special Attorney.

LOUISVILLE, KY., July 21st, 1913.

Mr. W. A. Colston, General Solicitor, Building.

DEAR SIR: Attached I hand you letter from Mr. John L. Rich, dated Frankfort, Ky., July 11, 1913, in reply to my letter of June 24th to Chief Clerk Veling, in which I asked that we be furnished with copies of the data and calculations in connection with our tentative assessment, and to which Mr. Veling, under instructions from Auditor Bosworth and Mr. Rich, had previously made reply, dated June 30th, to the effect that there were no figures to give.

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This letter was written to me by Mr. Rich at the suggestion of the Attorney General, who had previously informed me verbally that any time I should come to Frankfort he would be glad to take me to Mr. Rich and would see that I was furnished full information as to how said tentative assessment was made. Accordingly on the 16th inst., I phoned Attorney General Garnett informing him of my receipt of the letter from Rich, and asking if it would be convenient to him and Mr. Rich for me to come to Frankfort the following day, July 17th. He replied that Mr. Rich had written the letter at his instance, and stated he would see Mr. Rich in case he was then in Frankfort and ascertain whether the proposed appointment would suit and would let me know. I then requested him, if he arranged with Mr. Rich, to have the latter call me up and so advise me in order that I would be sure of seeing them when I should come up. Later in the day Mr. Rich called me over the phone, stating that he was then in the Attorney General's office and that that gentleman had requested him before lunch to call me, but that he had forgotton to do so. He then asked what I desired to learn, and I replied that previously the Attorney General had informed me verbally that any time I should come to Frankfort when both himself and Mr. Rich were there that I would be shown the figures as to how our assessment had been arrived at, and that I would be up the next day (July 17th) at 11:00 A. M. if convenient to them and he stated that the hour would suit them both and to come on and he would be glad to give

me any assistance he could. I then said 'you know if we have the method followed by the Board, we can the more intelligently prepare our protest and get up our side of the case on the hearing for a reduction.' He agreed with me and said he would do what he could to help.

488 I then advised him that I would be on hand the next morning (17th) at 11 o'clock and at the time mentioned I called on Attorney General Garnett in his office who informed me that Mr. Rich was waiting for me upstairs and that he would take me up as soon as he disposed of a little business matter with which he was then engaged. As soon as I entered the Board room where Mr. Rich was alone, he and the Attorney General both began to explain that practically no calculations had been made this year with respect to our franchise—that there was no necessity for so doing as they could not, under existing conditions, do other than stand by their last year's figures to begin with. Then Mr. Rich went on to say that they (the Board) referred to our own report to the Auditor, to the report of the directors to the stockholders, and to a publication issued by the Interstate Commerce Commission ('A Preliminary Abstract of Statistics of Common Carriers for the year ended June 30, 1912') by which it was apparent that for the year named both our gross and our net earnings had materially increased as compared with the previous year, and taking into consideration this increase, he and the individual members of the Board made figures as to the extent of the increase that would be proper over last year's figures (and I believe the Attorney General also stated that he had made figures) and that finally the Board concluded that our increased earnings justified a tentative assessment of $76,000,000.

Seeing that I was able to get but little definite information out of them as to this year's figures, I inquired as to how last year's figures were arrived at, and they both said according to the plan set out in Auditor Bosworth's supplemental affidavit, which was, they said, by taking as the percentage apportionable to Kentucky, the average of the various percentages secured by comparing Gross earnings in Kentucky to Entire Gross Earnings; Net Earnings in Kentucky to Entire Net Earnings and the mileage percentage, and then made figures on the income basis, on the stock and bond basis, etc.

I made light of Auditor Bosworth's supplemental affidavit, stating that I failed to see wherein Judge Cochran could glean from

489 it any information that would enable him to ascertain what he had so repeatedly and earnestly requested, that is, 'How did the Board arrive at the total value of $74,598,451?' Mr. Rich then stated that their case would stand or fall on that affidavit; that if Judge Cochran took our view of it, they would be knocked completely out, etc.

General Garnett left the room after a half hour or so, and I tried hard to get something definite out of Mr. Rich, but accomplished only the following: I read each memo. to him and he agreed thereto.

(1) Neither last year nor this year did the Board deduct all tangible from entire tangible and intangible to arrive at total intangible before apportioning.

(2) No figures were made on this year's tentative; no use to make elaborate calculations like those made last year. The reports showed increases in both gross and net earnings this year, and the Board considered the increase in the tentative assessment to be justified by the said increase in earnings.

(3) The Board figured last year 34.2 (Thompson's operated mileage basis) on operated income, and 25.34% on entire assets of all companies which we own, operate, lease or control, including N. C. & St. L. Ry., Monon, etc.

(4) 6% was used by the Board as basis of capitalization and no consideration whatever was given to the composite percentage.

(5) Garnett and Rich both stated that they believed 25.3443% to be correct mileage proportion of our road for Kentucky, but insisted that in using that proportion it is proper to as[illegible] against us in Kentucky the same percent of the entire assets of all companies which we operate, own, lease or control.

Before leaving Mr. Rich, I expressed my dissappointment at not having secured something more definite and he appeared to be surprised that he had not made everything perfectly clear.

490 After leaving Mr. Rich I saw Attorney General Garnett and expressed myself in like manner to him, and he replied that our little meeting simply opened the way to further meetings and that he was satisfied there would be no difficulty in our being able to reach a satisfactory figure with the Board as to this year's assessment and to compromise last year's assessment on the same basis. Neither member of the Board was in Frankfort on the 17th, when I was there. I understood since that the Board has an appointment with Polk Laffoon for Monday, August 4th., to take up the South Covington & Cincinnati Street Railway Company and that they proposed to take a vacation from August 7th., to sometime in September. I have learned further that it is not likely the full Board will be present at Frankfort at any one time between now and the State primary August 2nd.

Yours very truly,

(Sig.) R. E. FLEMING,
Special Attorney."

After the filing with the Board of the protest and petition against the second tentative assessment, in the course of which protest and petition certain inquiries had been made of the Board as to the course it had adopted in making the assessment, Counsel for the Board, Jno. L. Rich, wrote a letter, dated November 18th, 1913, to the General Counsel of the Railroad Company, in which he enclosed what he called "the tentative draft of answers to those interrogatories propounded, which letter of Mr. Rich, and the enclosures therein referred to are as follows; to-wit:

Letter from Jno. L. Rich.

"Office of Attorney General, Frankfort.

November 18, 1913.

Hon. H. L. Stone, General Counsel L. & N., Louisville, Ky.

DEAR COLONEL: I enclose you herewith answers to the interrogatories propounded by you yesterday. After consultation with
491 the members of the Board they directed the Attorney General and myself to prepare for them answers along these lines to the questions propounded by you on Monday.

We have not had time since the preparation of these answers to submit them to the Board, and each members thereof for their consideration. We will do this tomorrow, Wednesday. In order that you may have the immediate benefit of this information, I enclose you herewith a copy of the tentative draft of answers to those interrogatories propounded. On Thursday when the case is taken up, you will be advised of any changes that may be made in the answers hereto submitted.

Yours truly,

JOHN L. RICH."

J. L. R.-N.

Enclosure in Mr. Rich's Letter.

"(*a*) A computation was made by finding the average selling price of the shares of this company, and adding thereto the par or face value of its outstanding bonds as of June 30, 1912, in arriving at the entire value of the capital stock of this company. This calculation shows the value of the capital stock of respondent to be $227,278,500. Because of the large earnings of this company this and previous years available for the dividends to stockholders, as shown by its report to stockholders and to the Auditor, in our judgment the shares are worth more than their average market price during the year ending June 30, 1912, was shown to be, and for this reason the Board did not use or adopt the stock and bond plan to ascertain the value of the capital stock of respondent.

(*b*) $152.50 per share, the average selling price of the shares during the year ending June 30, 1912. The statute requires the company to report to the Auditor the highest price at which the shares sold during the year.

(*c*) The outstanding funded debt was considered as being
492 worth par, or its face value. We may state here there is some question in our minds as to the total amount of the outstanding bonds or funded debt of this company. The report of respondent to its stock holders, and its report to the Railroad Commission of this State, states respondent has outstanding bonds in the hands of the public of the face value of $136,978,500; that of the remainder of its outstanding authorized issue in its treasury, $7,079,000 is deposited in trust as collateral. This statement is unexplained. If

the company has borrowed money on these bonds, that is, used them as collateral for a loan and applied the money so obtained to its business, then such sum should be charged to capital stock of respondent in ascertaining the value thereof. We request you to give us an explanation of this entry. As the Board was not clear in its mind as to this transaction, these bonds were ignored.

(*d*) $227,278,500.

(*e*) $17,159,550.

(*f*) In other computations certain deductions were made from this amount, for instance, from the total net earnings as shown by your report to stockholders and to the Auditor, to-wit, $17,159,550, was deducted the rent of the Clarksville & Princeton branch, $12,089, and Paducah & Memphis division, $206,506; the dividend received by respondent on the stock it owns in the Chicago, Indianapolis & Louisville Railroad Company, to-wit, $236,830, and the dividend respondent received on the stock it owns in the Nashville, Chattanooga & St. Louis Railroad Company of $430,656, and the surplus of the South & North Alabama Railroad Company $639,581, which your report to stock holders shows was excluded from your surplus.

With these deductions made from your total net income,
493 the amount for capitalization was ascertained to be $15,633,-
935, which capitalized at 6 per cent shows the total value of the capital stock of respondent arrived at by this method to be $260,565,500. Other computations were made where the net earnings were taken as the basis of the calculation, all of which will be more fully set out herein.

(*g*) The net earnings, or income for the year ending June 30, 1912, alone was used in these calculations, the earnings of respondent having increased each year during the past three years at least.

(*h*) 6 per cent.

(*i*) $260,565,500, with all possible deductions allowed.

(*j*) The total value of the capital stock of the L. & N. Railroad Company as so found was apportioned to Kentucky on the basis of operated mileage in Kentucky to the operated mileage within and without Kentucky. The ratio is 35 per cent. An apportionment was also made on the basis of the gross earnings derived by respondent in Kentucky to the gross earnings of respondent within and without Kentucky. The ratio of gross earnings in Kentucky to that within and without Kentucky is 38 per cent. This information was obtained from the report of respondent to the Railroad Commission of Kentucky made as of June 30, 1912.

(*k*) The mileage percentage was 35 per cent. The gross income percentage 38 per cent. These percentages were obtained from the sources indicated in the next preceding question.

(*l*) The apportionment of the capital stock of the L. & N. Railroad Company was made on the operated mileage basis, that is to say, the miles of those companies in which this com-any owns a majority of the stock, but which are operated under their
494 separate managements and are separately taxed, were excluded in the ascertainment of the ratio of the mileage in Kentucky to the mileage within and without Kentucky. The number of miles within and without Kentucky were obtained from the report of

respondent to the Kentucky Railroad Commission of its mileage within and without Kentucky. The ratio is 35 per cent plus in Kentucky. If upon the final hearing this ratio is found incorrect, then the error can be taken into consideration in all computations to be made thereafter. None of these calculations were or are made on the theory that they are to be final. The tentative assessment was, in our opinion, neither binding on the State or company, but can be lowered or increased as the evidence before the Board on final hearing shall justify. The gross earnings derived in this State and the gross earnings derived in and out of the State, were obtained from the report of respondent to the Kentucky Railroad Commission of June 30, 1912. The ratio of gross earnings derived in Kentucky to gross earnings of company within and without Kentucky is 38 per cent plus.

(*m*) No, it was not.

(*n*) One of the computations made by the Board to ascertain the value of the franchise of the L. & N. Railroad Company embraced the entire mileage of the roads in which this company owns shares of stock, in finding the ratio of mileage within and without the State. This ratio was ascertained from the testimony of H. F. Thompson given on the hearing of this company in 1912. The ratio of such mileage in the State to that within and without the State was stated by him to be 25.44. In using this ratio, the total assets of those roads in which this company owns stock and claims to control said roads by reason thereof, were considered as
495 the assets of the L. & N. Railroad Company. We hold if the mileage of those roads are to be taken into account and consideration in finding the ratio of mileage in Kentucky to the mileage within and without Kentucky, the assets of those roads should also be considered with reference thereto. The Court of Appeals of this State so decided in the case of —— —— v. L. & N. Railroad Company, 149 Kentucky, 829.

(*o*) The percentage of 25.44 so used was obtained from the source above stated. The Board will ask you to furnish it with a statement showing the number of such miles of road owned, operated, leased and controlled within and without the State by those companies in which the L. & N. Railroad Company owns stock, and also furnish the Board with information showing the value of the total assets or capital stock of said companies whose stock is owned by the L. & N. Railroad Company. The Board also desires to have you furnish it with the information showing the number of such miles in Kentucky and the number of such miles within and without Kentucky, and the ratio thereof in the State of Kentucky.

(*p*) Valuation No. 1.

Net income of the L. & N. Railroad as shown by report to the Auditor and to the stockholders for the year ending June 30, 1912 is	$17,159,550
Capitalized at 6%	285,992,500
Apportioned to Kentucky on mileage basis, 35%, gives value of capital stock in Kentucky	100,097,375

Equalized at 80%	80,077,900
Less tangible property in Kentucky	28,806,072
Value of Franchise in Kentucky	$51,271,818
Total value of capital stock of Company	$285,992,500
Apportioned on gross income basis	108,677,150
Equalized at 80%	86,941,720
Less assessed value of tangible property in Kentucky	28,806,072
496 Value of Franchise in Kentucky	$58,135,648

Valuation No. 2.

Net income of the L. & N. R. R. less rents and dividends	$17,159,550
Deduct rents and dividends	1,307,067
	15,852,483
Capitalized at 6 per cent gives total value of capital stock of L. & N.	264,208,050
Apportioned to Kentucky on mileage basis, 35%, gives value of capital stock in Kentucky	92,472,817
Equalized at 80%	73,978,254
Less assessed value of tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$45,172,182
Total value of capital stock	$264,208,050
Apportioned to Kentucky on gross income basis gives value of capital stock in Kentucky	100,398,059
Equalized at 80% value of capital stock in Kentucky equalized	80,318,447
Deduct assessed value of tangible property	28,806,072
Value of franchise in Kentucky	$51,512,375

Valuation No. 3.

Value of capital stock of the L. & N. R. R. ascertained by capitalizing net income without deductions	$264,208,000
Total value of capital stock of roads in which the L. & N. R. R. Co. owns shares of stock	110,000,000
Total assets of all roads	$374,208,000
Apportioned to Kentucky on the basis of mileage owned, operated, leased or controlled, 25%, the value of capital stock in Kentucky	93,552,000

Equalized at 80% gives value of capital stock in Kentucky equalized	74,841,600
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$46,035,528

Valuation No. 4.

The report of respondent to the Railroad Commission of Kentucky shows the net operating revenue in Kentucky solely from operation of its road in Kentucky to be	$7,068,062
497 Deduct taxes paid in Kentucky	$718,620
Net operating revenue of company in Kentucky	6,349,442
Capitalized at 6% shows value of property in Kentucky	105,824,000
Equalized at 80% shows value of property in Kentucky equalized	84,659,200
Deduct assessed value of tangible property in Kentucky.	28,806,072
Value of franchise in Kentucky	$45,853,128

NOTE.—The statute does not mention this method of ascertaining the value of that portion of the capital stock of a corporation doing an interstate business in Kentucky, but this computation has an evidential bearing on the value of that portion of respondent's property in the State of Kentucky. It shows its value as an income producing unit.

Valuation No. 5.

Net earnings of the L. & N. Railroad Company as shown by report to stockholders for the year ending June 30, 1912, is	$17,159,550
Capitalized at 6%	285,992,500
Deduct value of non taxable stocks owned by the L. & N. R. R. Company in corporations separately taxed.	30,761,799
Total value of capital stock of L. & N. R. R. Company excluding as non-taxable investments	255,214,000
Apportioned to Kentucky on mileage basis, 35%, gives value of capital stock in Kentucky	89,324,900
Equalized at 80%	71,459,920
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	42,653,848
Value of capital stock in Kentucky ascertained as above stated	285,992,500
Apportioned to Kentucky on gross income basis gives value of capital stock in Kentucky	96,981,320
Equalized at 80%	77,585,056
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	48,778,984

(*q*) This information was given in answer to interrogatory next preceding.

(*r*) The Board in addition to the report of Company to Auditor as of June 30, 1912, also considered the Statutory Report of the Company to the Railroad Commission made as of June 30, 1912,
498 in respect to the net and gross earnings of the Company within and without Kentucky, the mileage of the Company within and without Kentucky, and the ratio thereof in Kentucky. The amount of taxes paid in Kentucky, and the nature and value of the Company's investments in the securities of other Companies, its operative income and expense in Kentucky and the ratio thereof. The Board also considered a publication designated as a preliminary abstract of Statistics of Common Carriers, issued by the Interstate Commerce Commission as of June 30, 1912, in reference to the gross and net income of Railroad Companies and other information. The Board also considered the bill filed by respondent in 1905 in the United States Court for the Eastern District of Kentucky against Siler, et al., which bill was sworn to by Mr. Milton H. Smith, then, and now, president of the respondent. This bill among other things stated the mileage of respondent within and without Kentucky as of June 30, 1905, the gross and net income within and without Kentucky as of same date, the cost of reproduction of that portion of respondent's road and equipment in Kentucky as of that date.

The Board requests you to furnish to it a copy of the report made by respondent to the Interstate Commerce Commission as of June 30, 1913.

All of the foregoing calculations were made for the purpose of aiding the Board to arrive at the fair cash value of that portion of plaintiff's property or capital stock in Kentucky. This we have not finally determined. We understand and construe the statute of this State relating to the assessment of the corporate franchise of corporations subject to taxation therein, to require the Board when at or fixing the value of the franchise of a corporation for taxation to first
ascertain the fair cash value of the assets or the capital stock
499 of the corporation under consideration; next it must apportion to this State the proportion thereof which the miles within the State bear to the total mileage within and without the State.

If the evidence warrants the belief that all miles of road under consideration are equal in value, or that part in Kentucky is of the average value, then that proportion of the entire value of the capital stock which the mileage in Kentucky bears to the mileage within and without Kentucky will be the value of the capital stock of the corporation in Kentucky, from which sum must be deducted the assessed value of the tangible property of the corporation in Kentucky, the remainder thus found being the value of the corporate franchise subject to taxation in the State. If the proportion or part of the road in Kentucky is not as valuable, or is more valuable as the case may be, than the remainder of the property of the corporation, then an apportionment of the entire value of the capital stock

of the corporation on the mileage basis is an improper way to ascertain the value of the portion of the capital stock in Kentucky.

In other words, an apportionment of value on the mileage basis in all cases may not be correct. The proportion or part of the property of the corporation under consideration in the State is and can be exactly ascertained by using the mileage basis of apportionment, but its relative value in the State to the remainder or that proportion out of the State will and does depend on other facts, for instance, the cost of reproduction new, less depreciation and its earning capacity. The value of the entire property and of that part or proportion within this State is a question of fact to be determined from all the evidence before the Board. The Board will expect you
500 to offer evidence of the value of your entire property, and evidence of the value of that part or portion thereof in Kentucky. Our finding as to the value of your stock and that proportion thereof in Kentucky when making a final assessment will be governed by the proof.

None of the foregoing calculations were made by the Board, or any one for it, prior to making the tentative assessment which was made on June 19, 1913."

And thereafter an additional response, signed by the members of the Board, was delivered to the Counsel for the Railroad Company, which was and is as follows, to-wit:

501 *Additional Response by Board to Interrogatories of Railroad Company.*

Frankfort, Kentucky.

Hon. H. L. Stone, Colonel W. A. Colston, Hon. R. E. Fleming, Attorneys for L. & N. Railroad Company.

MESSRS: In response to your communication of November 17, 1913, requesting answers to certain interrogatories therein contained, we submit the following:

(*a*) A computation was made by finding the average selling price of the shares of this company, and adding thereto the par or face value of its outstanding bonds as of June 30, 1912, in arriving at the entire value of the capital stock of this company. This calculation shows the value of the capital stock of respondent to be $227,278,500. Because of the large earnings of this company this and previous years available for dividends to stockholders, as shown by its report to stockholders and to the Auditor, in our judgment the shares are worth more than their average market price during the year ending June 30, 1912, and for this reason the Board did not use or adopt the stock and bond plan to ascertain the value of the capital stock of respondent.

(*b*) $152.50 per share, the average selling price of the shares during the year ending June 30, 1912. The statute requires the company to report to the Auditor the highest price at which the shares sold during the year.

(*c*) The outstanding funded debt was considered as being worth par, or its face value. We may state here that there is some question in our minds as to the total amount of the outstanding bonds or funded debt of this company. The report of respondent to its stockholders, and its report to the Railroad Commission of this State, states respondent has outstanding bonds in the hands of the public of the face value of $136,978,500; that of the remainder of its authorized issue in its treasury, $7,079,000 is deposited in trust as collateral. This statement is unexplained. If the company has borrowed money on these bonds, that is, used them as collateral for a loan and applied the money so obtained to its business, then such sum should be charged to capital stock or respondent in ascertaining the
502 value thereof. We request you to give us an explanation of this entry. As the Board was not clear in its mind as to this transaction, these bonds were not taken into consideration.

(*d*) $227,278,500.

(*e*) Yes.

(*f*). The *nte* earnings as shown by your report to stockholders, is towit: $17,159,550. From this amount was deducted the rent of the Clarksville & Princeton branch, $12,039, and Paducah & Memphis division $206,506; the dividend received by respondent on the stock it owns in the Chicago, Indianapolis & Louisville Railroad Company, towit: $236,830, and the dividend respondent received on the stock it owns in the Nashville, Chattanooga & St. Louis Railroad Company of $430,656, and the surplus of the South & North Alabama Railroad Company, $639,581, which your report to stockholders shows was excluded from your surplus for the year ending June 30, 1912. With these deductions made from your total net income, the amount for capitalization was ascertained to be $15,633,935, which capitalized at 6 per cent shows the total value of the capital stock of respondent arrived at by this method to be $260,565,500. Other computations were made where the net earnings were taken as the basis of the calculation, all of which will be more fully set out herein.

(*g*) The net earnings, or income, for the year ending June 30, 1912, were used in these calculations.

(*h*) 6 per cent.

(*i*) $260,565,500 with all possible deductions allowed.

(*j*) The total value of the capital stock of the L. & N. Railroad Company as so found was apportioned to Kentucky on the basis of operated mileage in Kentucky to the operated mileage within and without Kentucky. The ratio of gross and net income of respondent in Kentucky was ascertained as an evidential bearing on the value of the mileage proportion or part of its property in Kentucky. To illustrate: If A owned a farm of 200 acres situated in two adjoining counties, 50 acres of which was in one county, and 150 acres, or the remainder thereof, in the other, 25 per cent of the land would be in one county and 75 per cent in the other. But the 50 acres or 25 per cent of that farm might be equal in value to 40 per cent of

the total value of the whole tract because of productivity and
503 favorable location.

(*k*) The ratio of mileage in Kentucky was found to be 35 per cent. The ratio of gross income in Kentucky was found to be 38 per cent plus. These facts was ascertained from the report of respondent to the Railroad Commission of Kentucky made as of date June 30, 1912.

(*l*) The apportionment of the capital stock of the L. & N. Railroad Company was made on the operated mileage basis, that is to say, the miles of those companies in which this company owns shares of stock, but which are operated under their separate management and are separately taxed, were excluded in the ascertainment of the ratio of the mileage in Kentucky to the mileage within and without Kentucky. The number of miles within and without Kentucky. The number of miles within and without Kentucky were obtained from the report of respondent to the Kentucky Railroad Commission of its mileage within and without Kentucky. The ratio of mileage in Kentucky as reported is 35 per cent plus in Kentucky. If upon the final hearing this ratio is found incorrect, correct ratio will be used in all computations used in arriving at final assessment. The tentative assessment is, in our opinion neither binding on the State or company, but can be lowered or increased as the evidence before the Board on final hearing shall justify. The gross earnings derived in this State and the gross earnings derived in and out of the State, were obtained from the report of respondent to the Kentucky Railroad Commission of June 30, 1912. The ratio of gross earnings derived in Kentucky to gross earnings of the company within and without Kentucky is 38 per cent plus.

(*m*) No, it was not.

(*n*) One of the computations made by the Board to ascertain the value of the franchise of the L. & N. Railroad Company embraced the entire mileage of the roads in which this company owns shares of stock, in finding the ratio of mileage within and without the State. This ratio was ascertained from the testimony of H. F. Thompson given on the hearing of this company in 1912. The ratio of such mileage in the State to that within and without the State was stated by him to be 25.44. In using this ratio, the total assets of those roads in which this company owns stock, and claims to control said roads by reason thereof, were considered as the assets of the L. & N. Railroad Company. We hold that if the mileage of those roads are to be taken into account and consideration in finding the ratio of mileage in Kentucky to the mileage within and without
504 Kentucky, the assets of those roads should also be considered in ascertaining the value of the capital stock of respondent. The Court of Appeals of this State so decided in the case of —— v. L. & N. Railroad Company, 149 Kentucky.

(*o*) The per centage of 25.44 so used was obtained from the source above stated. The Board asks you to furnish it with a statement showing the number of such miles of road owned, operated, leased and controlled within and without the State by those companies in which the L. & N. Railroad Company own stock, and also

furnish the Board with information showing the value of the total assets or capital stock of said companies whose stock is owned by the L. & N. Railroad Company. The Board also desires to have you furnish it with the information showing the number of such miles in Kentucky and the number of such miles within and without Kentucky, and the ratio thereof in the State of Kentucky.

(*p*) Valuation No. 1.

Net income of the L. & N. Railroad as shown by report to the Auditor and to the stockholders for the year ending June 30, 1912, is	$17,159,550
Capitalized at 6%	285,992,500
Apportioned to Kentucky on mileage basis, 35%, gives value of capital stock in Kentucky	100,097,375
Equalized at 80%	80,077,900
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$51,271,818
Total value of capital stock of company	$285,992,500
Apportioned on gross income basis	108,677,150
Equalized at 80%	86,941,720
Less assessed value of tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	58,135,648

Valuation No. 2.

Net income of the L. & N. R. R., less rents and dividends	$17,159,550
Deduct rents and dividends	1,307,067
	$15,852,483
505 Capitalized at 6 per cent gives total value of capital stock of L. & N.	$264,208,050
Apportioned to Kentucky on mileage basis, 35% gives value of capital stock in Kentucky	92,472,817
Equalized at 80%	73,978,254
Less assessed value of tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	45,172,182
Total value of capital stock	$264,208,050
Apportioned to Kentucky on gross income basis gives value of capital stock in Kentucky	100,398,059
Equalized at 80% value of capital stock in Kentucky equalized	80,318,447
Deduct assessed value of tangible property	28,806,072
Value of franchise in Kentucky	$51,512,375

Valuation No. 3.

Value of capital stock of the L. & N. R. R. ascertained by capitalizing net income without deductions	$264,208,000
Total value of capital stock of roads in which the L. & N. R. R. Co. owns shares of stock.....	110,000,000
Total assets of all roads	374,208,000
Apportioned to Kentucky on the basis of mileage owned, operated, leased or controlled, 25%, the value of capital stock in Kentucky	93,552,000
Equalized at 80% gives value of capital stock in Kentucky equalized	74,841,600
Less tangible property in Kentucky	28,806,072
Value of Franchise in Kentucky	$46,035,528

Valuation No. 4.

The report of respondent to the Railroad Commission of Kentucky shows the net operating revenue in Kentucky solely from operation of its road in Kentucky to be	7,068,062
Deduct taxes paid in Kentucky	718,620
Net operating revenue of company in Kentucky ...	6,349,442
Capitalized at 6% shows value of property in Kentucky	105,824,000
Equalized at 80% shows value of property in Kentucky equalized	84,659,200
Deduct assessed value of tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	45,853,128

NOTE.—The statute does not mention this method of ascertaining the value of that portion of the capital stock of a corporation
506 doing an interstate business in Kentucky, but this computation has an evidential bearing on the value of that portion of respondent's property in the State of Kentucky. It shows its value as an income producing unit.

Valuation No. 5.

Valuation in conformity with Judge Cochran's opinion—

Value of operative property of L. & N. Railroad Company within and without Kentucky ascertained by capitalizing net operating income derived by L. & N. Railroad Company wholly from its operative mileage.

Operating revenue of L. & N. R. R. Company as shown by Interstate Commerce Commission	$14,882,672
Capitalized at 6 per cent	248,044,500
Tangible value of operative mileage, road and equipment, (see protest of report)	178,927,902
Intangible value of operative road and equipment	69,116,598
35% Kentucky's share of value of tangible property on operative mileage basis	62,523,665
Kentucky's share of intangible value of road and equipment on gross earnings basis 38%	26,264,297
Value of Kenutcky's share of the operative mileage of property of the L. & N. Railroad Company	$88,787,962

In addition to the operative mileage and equipment thereof the L. & N. Railroad Company owns and has the following personal property, all of which is taxable and must be considered by the Board in fixing the value of its franchise subject to taxation (See Cumberland Telegraph & Telephone Company, 30 Ky.)

This character of personal property—

Bonds par value—$13,065,408—Ledger value—$12,538,049.

Stock in foreign corporations that do not pay taxes in Kentucky. The Board has not ascertained this value.

Advances to proprietary, affiliated and controlled companies for construction and betterment, (See balance sheet of Company)	$7,992,897
Temporary advances to proprietary affiliated and controlled Companies, (See balance sheet)	6,335,245
Special deposits	862,135
Total value of personal property	$27,728,326

507 The Illinois Central Ry. Company and the C. & O. Railroad Company, and the C. N. O. & T. P. Ry. Company contend and claim this character of personal property should not be considered in fixing the value of their franchise in Kentucky, because the situs of taxation for same is at the domicile of the corporation. The L. & N. Railroad Company claimed before the Alabama Railroad Commission that the situs of taxation of this character or kind of its property was at the domicile of the corporation, of Louisville, Kentucky. Out of an abundance of caution, and to be conservative, we will apportion this property to Kentucky on the operative mileage basis, 35% $9,704,914

Recapitulation.

Kentucky's proportion of tangible property	62,523,665
Kentucky's proportion of intangible value of road equipment	26,264,297
Kentucky's proportion of personal property	9,704,914
Total of all taxable property of L. & N. Railroad Company in Ky.	$98,492,876

Valuation No. 6.

Net earnings of the L. & N. Railroad Company as shown by report to stockholders for the year ending June 30, 1912, is	$17,159,550
Capitalized at 6%	285,992,500
Deduct value of non taxable stocks owned by the L. & N. R. R. Company in corporation separately taxed	30,761,799
Total value of capital stock of L. & N. R. R. Co., excluding as non-taxable investments	$255,214,000
Apportioned to Kentucky on mileage basis, 35% gives value of capital stock in Kentucky	89,324,900
Equalized at 80%	71,459,920
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	48,778,984
Value of capital stock in Kentucky ascertained as above stated	$285,992,500
Apportioned to Kentucky on gross income basis gives value of capital stock in Kentucky	96,981,056
Equalized at 80%	77,585,056
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	48,778,984

(*q*) This information was given in answer to interrogatory next preceding.

(*r*) The Board in addition to the report of the Company to the Auditor as of June 30, 1912, also considered the Statutory Report of the Company to the Railroad Commission made as of June 30, 1912, in respect to the net and gross earnings of the Com-
508 pany within and without Kentucky, and the ratio thereof in Kentucky. The amount of taxes paid in Kentucky, and the nature and value of the Company's investments in the securities of other companies, its operative income and expenses in Kentucky and the ratio thereof. The Board also considered a publication designated as a preliminary abstract of Statistics of Common Carriers, issued by the Interstate Commerce Commission as of June 30, 1912,

in reference to the gross and net income of Railway Companies and other information. The Board also considered the bill filed by respondent in 1906 in the United States Court for the Eastern District of Kentucky against Siler et al. which bill was sworn to by Mr. Milton H. Smith, then and now, president of the respondent. This bill among other things stated the mileage of respondent within and without Kentucky as of June 30, 1905, the gross and net income within and without Kentucky as of same date, the cost of reproduction of that portion of respondent's road and equipment in Kentucky as of that date. We also considered the finding as to the number of miles of road in the L. & N. System, the condition of the road in Alabama and its earning capacity as found and set out in the opinion of Judge Jones, 193 Federal, page 800.

The Board requests you to furnish to it a copy of the report made by respondent to the Interstate Commerce Commission as of June 30, 1912.

All the foregoing calculations were made for the purpose of aiding the Board to arrive at the fair cash value of that portion of plaintiff's property or capital stock in Kentucky. This we have not finally determined. We understand and construe the statute of this State relating to the assessment of the corporate franchise of corporation subject to taxation therein, to require the Board when arriving at or fixing the value of the franchise of a corporation for taxation to first ascertain the fair cash value of the assets or capital stock of the corporation under consideration; next it must be apportioned to this State the proportion thereof which the miles within the State bear to the total mileage within and without the State.

If the evidence warrants the belief that all miles of the road under consideration are equal in value, or that part in Kentucky is of the average value, then that proportion of the entire value of the capital stock which the mileage in Kentucky bears to the mileage within and without Kentucky will be the value of the capital stock of the corporation in Kentucky, from which sum must be deducted
509 the assessed value of the tangible property in Kentucky, the remainder thus found being the value of the corporate franchise subject to taxation in the State. If that proportion or part of the road in Kentucky is not as valuable, or is more valuable as the case may be, than the remainder of the property of the corporation, then an apportionment of the entire value of the capital stock of the corporation on the mileage basis is an improper way to ascertain the value of the portion of the capital stock in Kentucky.

In other words, an apportionment of value on the mileage basis in all cases may not be correct. The proportion or part of the property of the corporation under consideration in the State is and can be exactly ascertained by using the mileage basis of apportionment, but its relative value to the remainder or that proportion out of the State will and does depend on other facts, for instance, the cost of reproduction now, less depreciation and its earning capacity. The value of the entire property and of that part or proportion within this State is a question of fact to be determined from all the evidence before the Board. The Board requests you to offer

evidence of the value of your entire property, and evidence of the value of that part or portion thereof in Kentucky. Our finding as to the value of your capital stock and that proportion thereof in Kentucky when making a final assessment will be governed by the proof.

The foregoing answers to your interrogatories and statements therein, in connection with our statement heretofore given you on October 23, 1913, embraces as nearly as we can state to your own opinion as to how the value of your franchise in Kentucky subject to taxation should be ascertained. If these views conflict with those entertained by your representatives, we ask your representatives to point out wherein our views are erroneous, and in addition thereto to submit to us what, in your opinion, is the correct method of ascertaining the value of your taxable franchise in Kentucky.

We request you to submit for our consideration calculations showing the value of your franchise, based upon and made in conformity to the opinion of Judge Cochran recently rendered in the case of L. & N. Railroad Company v. Bosworth et al, in the United
510 States District Court for the Eastern District of Kentucky as we will endeavor to conform to that opinion in making the final assessment of your franchise for this year.

(Signed) H. M. BOSWORTH, *Auditor.*
(Signed) C. F. CRECELIUS,
Secretary of State.
(Signed) THOS. S. RHEA,
Treasurer, State of Ky.

511 *Statement of Attorney General.*

After the receipt of the last mentioned response of the Board in a colloquy between the Attorney General of the State, General Garnett, and the General Counsel of the Railroad Company, Col. Stone, in the presence of the Board, and referring to certain tabular statements contained in the response and explanatory thereof, the Attorney General said:

"As I understand, from what the Board has said to me, these calculations were made and used as evidence of the fact that the result which they reached was correct. They did not adopt either of these calculations to obtain the result, but used them merely as evidence of the fact that the result obtained by the calculations that they did make, or the finding that they made, was correct."

Affidavit of C. O. Bradford.

The affidavit of C. O. Bradford, Real Estate Agent of the Louisville & Nashville Railroad Company, and three exhibits therewith were read in evidence as follows:

"Assessment of Franchise of Louisville & Nashville Railroad Company in Kentucky for 1913.

STATE OF KENTUCKY,
Jefferson County, sct:

The affiant, C. O. Bradford, states he is Real Estate Agent of the Louisville & Nashville Railroad Company, and has been for 21 years and over.

Among his duties is the preparation of returns for taxation of the physical properties of said Company in the various States for the payment of taxes due different States, counties, cities, towns and taxing districts upon and after such assessments have become final, including franchise assessments.

Affiant states that he also performs like services for other corporations in which the Louisville & Nashville Railroad Company owns capital stock, and whose returns for taxation are made up separately and independently from the Louisville & Nashville Railroad Company, and whose vouchers for taxes on the assessments of their property, tangible and intan-ible, are made up and paid separately.

He is also familiar with the facts and knows that still other corporations in which the Louisville & Nashville Railroad Company owns capital stock pay all their taxes on all their property,
512 tangible and intangible, located or taxable in the State of Kentucky, to the State, County, city, town and taxing districts in said State where taxable.

He files herewith as part hereof marked "Exhibit No. 1" a statement showing the names of corporations in which the Louisville & Nashville Railroad Company owns capital stock which pay their taxes on all their property, tangible and intangible, located or taxable in the State of Kentucky, showing the par value and book value represented by the Louisville & Nashville Railroad Company's stock interest therein, as of June 30th, 1912.

He also files as part hereof marked "Exhibit No. 2" a statement of the corporations embraced in said Exhibit No. 1, whose returns for taxation to the taxing authorities of the State of Kentucky affiant makes up himself and prepares the vouchers for the payment of their taxes, and knows that said corporations pay all their taxes on all their property, tangible, located and taxable in the State of Kentucky to the authorities thereof.

He files herewith as part hereof marked "Exhibit No. 3" a statement of those corporations set forth in said Exhibit No. 1, whose tax returns and vouchers for payment of taxes are not made up by affiant, but which affiant states pay all their taxes on all their property, tangible and intangible, located or taxable in the State of Kentucky, and in which the Louisville & Nashville Railroad Company owns capital stock, as set forth in said Exhibit No. 1.

C. O. BRADFORD.

Subscribed and sworn to before me by said C. O. Bradford this November 15th, 1913.

GEORGE E. ZUBROD,
[SEAL.] *Notary Public, Jefferson County, Kentucky.*

EXHIBIT No. 1.

Louisville & Nashville Railroad Company.

Statement of Stocks Owned by the Louisville and Nashville Railroad Company in Other Corporations Which Pay Taxes on All Their Property Located in the State of Kentucky, Showing Par Value and Book Value as of June 30th, 1912.

	Par value.	Book value.
513 Frankfort & Cincinnati Railway	$19,975.00	$487,719.81
Central Transfer Ry. & Storage Co.	25,000.00	11,354.65
Lexington Union Station Co.: Common 5,000 / Preferred 25,000	30,000.00	25,000.00
Madisonville Hartford & Eastern Rd.	50,000.00	1,817,749.60
Morganfield & Atlanta Railroad	50,000.00	498,461.04
Wasioto & Black Mountain Rd. Co.	50,000.00	2,765,401.61
Colossal Cavern Co.	25,000.00	30,163.17
Elkton & Guthrie Rd. Co.	17,275.00	15,175.00
Kentucky Public Elevator Co.	37,300.00	37,439.50
Lexington & Eastern Ry.	500,000.00	6,991,145.35
Louisville, Henderson & St. Louis Ry.: Common $1,631,385.50 / Preferred 776,081.03	2,407,468.53	519,788.73
Chicago, Indianapolis & Louisville Ry.: Common $4,903,450.00 / Prefd. 1,936,700.00	6,840,150.00	6,008,533.62
Kentucky Highlands Railroad	250,000.00	583,171.74
Nashville, Chattanooga & St. Louis Ry.	7,177,600.00	6,597,525.25
Clarksville & Princeton Branch: That part assessed against the Illinois Central Railroad	(See note)	240,794.25
Paducah & Memphis Division: Assessed against the N. C. & St. L. Ry.	(See note)	4,130,376.03
Total	$17,479,766.53	$30,761,799.35

NOTE: Included in L. & N. Stock.

EXHIBIT No. 2.

Louisville & Nashville Railroad Company.

Statement of Stocks Owned by the Louisville & Nashville Rd. Co. in Other Corporations, Which Pay Taxes on All of Their Property Located in the State of Kentucky, Showing Par Value and Book Value as of June 30th, 1912, and Whose Returns for Assessment Are Prepared in the Office of the Real Estate Agent of the Louisville & Nashville Railroad Company.

	Par value.	Book value.
Central Transfer Ry. & Storage Co....	$25,000.00	$11,354.65
Madisonville, Hartford & Eastern Rd.	50,000.00	1,817,749.60
Morganfield & Atlanta Railroad....	50,000.00	198,431.04
Wasioto & Black Mountain Rd. Co...	50,000.00	2,765,401.61
Colossal Cavern Co.....	25,000.00	30,163.17
Total	$200,000.00	$5,123,130.07

514 EXHIBIT No. 3.

Louisville & Nashville Railroad Company.

Statement of Stocks Owned by the Louisville and Nashville Railroad Company in Other Corporations Which Pay Taxes on All of Their Property Located in the State of Kentucky, Showing Par Value and Book Value as of June 30th, 1912, and Whose Returns for Assessment Are Prepared by Their Own Officers.

	Par value.	Book value.
Lexington Union Station:		
Common ..... 5,000 / Prefd. ..... 25,000 \	$30,000.00	$25,000.00
Elkton & Guthrie Rd. Co.....	17,275.00	15,175.00
Kentucky Public Elevator Co....	37,300.00	37,439.50
Lexington & Eastern Railway....	500,000.00	6,991,145.35
Louisville, Henderson & St. Louis Ry.		
Common .. $1,631,385.50 / Prefd. .... 776,081.03 \	2,407,466.53	519,788.73
Chicago, Indianapolis & Louisville Ry.		
Common .. $4,903,450.00 / Prefd. .... 1,936,700.00 \	6,840,150.00	6,008,533.62
Kentucky Highlands Railroad...	250,000.00	583,171.74
Nashville, Chattanooga & St. Louis Ry.	7,177,600.00	6,597,525.25
Frankfort & Cincinnati Ry.....	19,975.00	489,719.81

Clarksville & Princeton Br.:		
That part assessed against the Illinois Central Railroad..	(See note)	240,794.25
Paducah & Memphis Division:		
Assessed against N. C. & St. L. Ry.	(See note)	4,130,376.03
Total	$17,279,766.53	$25,638,669.28

Note: Included in L. & N. Stock."

Testimony of W. L. Mapother.

W. L. Mapother.

W. L. MAPOTHER was called as a witness and testified on behalf of plaintiff orally before the Board as follows:

I am First Vice President of the Louisville & Nashville Railroad Company and aid the President in supervising all departments of the Company's service. I am thoroughly familiar with its properties.

Referring to the exhibits filed by Mr. C. O. Bradford, and
515 particularly to the exhibit No. 1, filed by him, showing a book value of $30,761,799.35 of stocks listed by him as belonging to the Louisville & Nashville Railroad Company in other corporations which pay taxes on all of their property in Kentucky, I make the following statement as a comparison between their book values and their real values or current market values, taking them in the order in which they are given in the exhibit.

Frankfort & Cincinnati Railway: The book value of which is given as $489,719.81, represented as of June 30, 1912, the cost of the Frankfort & Cincinnati Railway stock to the L. & N. Rd., its real value is problematical, but the stock cost the L. & N. R. Co. that much money.

The Central Transfer Railway & Storage Co. is a Kentucky corporation, operating the transfer railway in the City of Louisville; its stock and bonds being owned jointly by the L. & N. and Southern Railway. The stock pays a dividend of 5% per annum, and is easily worth par, $25,000.00.

The Lexington Union Station Company is a Kentucky corporation; has no bonded debt, and its stock owned by the L. & N. is easily worth par, to-wit, $30,000.

The stock of the Madisonville, Hartford & Eastern Railroad Company, represents the total amount expended by the L. & N. Railroad Company in the construction of that road; it has no bonds outstanding. The actual value of that stock is not less than the book value, to-wit: 1,817,749.60.

The same is true of the Morganfield & Atlanta Railroad. Its stock is worth not less than book value, $498,461.04.

The Wasioto & Black Mountain Railroad Company is a Kentucky

corporation, and the value of that stock is not less than the total amount expended in the construction of the road, to-wit: $2,765,-401.61. There are no bonds or other liens on the property.

The Colossal Cavern Company stock represents the total cost of the property owned by that company, and its present value is largely in excess of its cost. The stock is easily worth the book value, $30,163.17.

The Company owns a cave adjoining Mammoth Cave, and the property has a large future value.

516 The Elkton & Guthrie Railroad: The operations of this Company are quite favorable. It has greatly reduced its bonded debt, and, in my opinion, the value of the stock is not less than par, $17,275.00.

The Kentucky Public Elevator Company is a Kentucky corporation, doing a storage business. The stock is a good dividend payer, and worth, on the market, more than par, to-wit: $37,300.00. It cost the L. & N. $37,439.50. In my opinion its value is greater than its book value or cost.

The stock in the Lexington & Eastern was acquired by the L. & N. at a cost of $915,253.00, and with its acquisition the L. & N. Railroad assumed liability for the bonds then outstanding on the property. The Company has since, by purchase, eliminated those bonds, and in addition has advanced funds for construction of extensions, addition and betterments, making a total cost to the ownership, represented by the stock, $6,991,145.35, and I am of the opinion that the value of the stock in the Lexington & Eastern is not less than that amount. I speak of this value as of June 30, 1912. Its value to us is greater than the figure given.

The Louisville, Henderson & St. Louis Railway stock owned by the L. & N. as of June 30, 1912, was at par $2,407,468.53, and its cost or book value, was $519,788.73. In my opinion its real value is not less than the latter amount. The amount owned by the L. & N. is a majority of the stock.

Chicago, Indianapolis & Louisville Railway Company: The par value of the stock owned by the L. & N. Railroad Company in this company as of June 30, 1912, was, $6,840,150.00, and its book cost was $6,008,533.62. The stock is divided as between common and preferred, $4,903,450, common and $1,936,700, preferred. The preferred pays a dividend of 4%, and the common a dividend of 3¼%, and from an investment standpoint, the stock, common and preferred, is worth not less than the amount spent for its acquisition, namely, $6,008,533.62.

The Kentucky Highlands Railroad stock represents a total investment for its acquisition of $583,171.74, and is, in my opinion worth not less than that sum.

517 The Nashville, Chattanooga & St. Louis Railway stock, par value of which, owned by the L. & N. as of June 30, 1912, was $7,177,600.00, had a book value of $6,597,525.25.

But its real value was materially greater than its back value. The average market price of that stock during 1912 was in the neighborhood of $140.00 per share. Its market price today is $135.00 bid

and $140.00 asked. On a basis of $140., the value of this stock as of June 30, 1912, was $10,048,640.

The Clarksville & Princeton Branch: Book value $240,794.25, represents the cost of that portion of the line leased to the Illinois Central, and assessed against that company, and its real value is no less than its book value.

Paducah & Memphis Division: Book value $4,130,376.03, represents the cost of the property leased to the N. C. & St. L. Railway and assessed against that Company. The rental paid by the lessee is 5% on such valuation, and sufficient to make the real value not less than par; to-wit, $4,130,376.03.

This property is owned by the L. & N. in fee, but is leased to the N. C. & St. L. Railway for 999 years. It is not operated by the L. & N. Railroad at all. The line extends from Paducah, Ky., to Memphis, Tenn. While it is leased to the N. C. & St. L. the L. & N. has a joint trackage agreement for the use of about 4½ miles between Leewood, a suburb of Memphis, and the freight and passenger terminals that are jointly used in Memphis.

Cross-examination of W. L. Mapother:

The Frankfort & Cincinnati Railway is a Kentucky corporation, owning and operating 40 miles of road, having terminals at Paris, Ky., and Frankfort, Ky. Its capital stock is $50,000, of which the L. & N. owns $19,973. The amount of stock issued and outstanding is $40,000. It issued $160,000, of bonds, but when the L. & N. Railroad acquired the property it practically retired those bonds by discontinuing the payment of interest, and if the bonds are outstanding they are owned by the L. & N. I understand they pay 4% interest. The company has never earned or paid any dividend.

Its gross expenses have been greater than it- gross earnings.

518 I did not say that the stock of this company was worth par:

I gave its cost to the L. & N. and said its value was problematical. I should say that the L. & N. stock in that road as of June 30, 1912, was worth as much as $19,900.00.

In the Central Transfer Railway and Storage Company the L. & N. owns $25,000. of the stock, and my recollection is that the Southern owns the same amount, the total capital being $50,000. It is a Kentucky corporation, doing business in Louisville, and has paid 5% dividend. I think the stock is worth several times its par value. It owns the railroad that it operates, commonly called the "hub track," connecting various railroads and industries. I know of no transfers of the stock as there are only two owners.

The Lexington Union Station Company is a Kentucky corporation, with an authorized capital stock of $30,000., of which $15,000. has been issued, and an authorized preferred of $500,000, of which $378,000. has been issued. I do not know whether it pays a dividend on the common stock or not; but it does pay a 5% dividend on the preferred. I regard the common stock as absolutely worth par, but not more.

The Madisonville, Hartford & Eastern Railroad is a Kentucky

corporation, with an issued capital stock of $50,000., of which the L. & N. owns the entire amount. There are no outstanding bonds in the hands of the public. The L. & N. Railroad has a first lien on the road for advances that it made, because of its ownership of all of the capital stock; but in the ordinary acceptation of the term, there are no bonds on the property. The L. & N., however, has a mortgage on it in the sum of $1,817,749.60. The road has not been able to earn its interest, nor declared a dividend, nevertheless, I regard the stock as worth more than par. It is worth par, plus all advances made, because of the ownership of that stock; and the value comes in the ownership of the property by reason of holding all of the stock. Its value is $1,817,749.60. It is worth that to the Louisville & Nashville Railroad Company, because it forms an integral part of that system. And its future and prospective value is not less than the amount which it cost to build it. The road is a part of the L. & N. system, but it is separately taxed. The
519 entry of $10.00 as the value of its stock in the report of the L. & N. to the Auditor of Public Accounts was a mere nominal figure. The length of the Madisonville, Hartford & Eastern Railroad is 65.49 miles.

The Morganfield and Atlanta Railroad is a Kentucky corporation, having a length of 25.33 miles, and an authorized capital of $50,000. The L. & N. owns all of its stock. There are no bonds on it, but there is a mortgage out against it; the road is operated as a part of the L. & N. System; the road has never paid interest on the debt which it owes to the L. & N., and has never earned a dividend. It is my understanding that it is operated at a loss. I consider the L. & N. stock in the road as worth the amount of money that was put in the road, because the company had no other way of securing the capital except by having it advanced by the owners of the stock; and the L. & N.'s advances aggregated $498,461.04. In addition to the $50,000 par value of stock, the L. & N. advanced $448,461.04.

The Wasioto & Black Mountain Railroad is a Kentucky corporation, having a length of 70.05 miles, operating between point of connection with the Cumberland Valley Division of the L. & N. at a station called Orby, near Wasioto to the town of Harlan, and having a branch line from Harlan to Benham, and also from Harlan up Clover Creek of the Cumberland River 6 or 7 miles. Its total authorized capital is $50,000, all of which the L. & N. owns. The L. & N. did not originally advance the money to build this road; it advanced money to create extensions made after it acquired all of the stock. And prior to June 30, 1912, the L. & N. had invested in this road $2,765,401.51, which includes the $50,000 of its capital stock, which I regard as worth the amount of money invested in the road. The L. & N. has no evidence of indebtedness other than its ownership of the stock. This road, the Wasioto & Black Mountain, is operated by the L. & N. in connection with the lines of the system, but the operations of the road are necessarily those of the Wasioto & Black Mountain, because that company has title to the road and is responsible for its operations. The revenues of the road are collected by the L. & N., and credited to the Wasioto & Black Mountain

Railroad Company. As a matter of fact no officer of the L.
520 & N. is an officer of the Wasioto & Black Mountain. The L. & N. Railroad conducts operations and necessarily controls them over the road.

The Colossal Cavern Company is a Kentucky corporation, owning cave properties and cave rights in Hart and Edmonson counties, Kentucky. Its total capital is $25,000. It has never paid a dividend. The par value of the L. & N. stock in this Company is $25,000. It is carried on the books of the L. & N. at $30,163.17. The difference between the two figures represents advances made by the L. & N. for the acquisition of the property and the conduct of the business. The income from the corporation is not more than sufficient to pay expenses and taxes. The income is derived from visitors to the cave. The corporation owns land in fee simple. The existence of this cave has been known since about 1896.

The Elkton & Guthrie Railroad Company is a Kentucky corporation with an authorized capital of $300,000 and owning capital of $447,372.25. Its termini are Guthrie, Ky., and Elkton, Ky. It is operated for the account of its owners, the L. & N. operating it and turning over net receipts to the Elkton & Guthrie. The organization of the two companies are entirely separate. The L. & N. makes no charge for service, except actual cost. The book value attached to the stock of this Elkton & Guthrie Road as carried by the L. & N., to-wit, $15,175.00, is what the stock actually cost many years ago, and I consider it worth par. In time it should pay a fairly good dividend. I do not think the Elkton & Guthrie owns its own cars and engines. I think the L. & N. furnishes the freight equipment, probably without charge. I do not remember whether the L. & N. pays the taxes on the Elkton & Guthrie or not.

The Kentucky Public Elevator Company is a Kentucky Corporation in the business of storing and handling grain. It has an authorized capital of $200,000, of which the L. & N. owns $37,300. It pays a dividend of 5 or 6 per cent.

All of the stock of the Lexington & Eastern Railroad was owned by the L. & N. on June 30, 1912; $500,000 being the total amount of the same, and this is included in the $6,991,145.53, shown as the book value of the stock on Bradford's statement, and I
521 regard that stock as representing ownership worth the last named figure. It could not have been sold for that, but it was worth that to the Louisville & Nashville Railroad.

The Louisville, Henderson & St. Louis Railway has an issued capital of $2,000,000 common and $2,000,000 preferred. It pays no dividends. Its common stock is worth, perhaps, not to exceed 35 cents on the dollar. The L. & N. owns none of the bonds of the Louisville, Henderson & St. Louis.

The Chicago, Indianapolis & Louisville Railway Company (Monon) pays a dividend of 3¼% on its common stock and 4% on its preferred. It operates between Louisville and Chicago. None of its main line mileage is in Kentucky, except in the City of Louisville and suburbs. It owns a bridge across the Ohio River (known as the K. & I.) with the Baltimore & Ohio and Southern Railways.

It has freight terminals and freight station in Louisville and pays taxes in Kentucky. Its mileage in Kentucky is about 1½. The total mileage of this system is 616.60 miles, which includes branches to the Bedford Quarries, French Lick Springs and to Indianapolis. The Louisville & Nashville owns $6,840,150 par value out of a total issue of $15,500,000, of the stock of this road, to-wit, 44.114%. The common stock of that road is $10,500,000, and preferred stock $5,000,000. The Southern Railway owns the same amount of stock in this (the Monon) Road as the L. & N. These two roads, the L. & N. and the Southern, have a joint agreement covering an understanding that the property will be managed independently for joint account. Neither of these roads has anything to do with collecting or disbursing the revenues of the Monon. The two owning roads have an agreement as to the election of directors and the management of the road. They give proxies to the management; that agreement is in writing.

The Kentucky Highlands Railroad Company has an authorized and issued capital of $250,000, which is virtually owned by the L. & N. As a matter of fact the stock is held in escrow, subject to the performance of certain obligations, but that the conditions are such that the L. & N. practically owns it. It has not all been paid for.

It runs from Cliff-side, near Frankfort, Ky., to Versailles, Ky.,
522 to a connection with the Louisville & Atlantic Division of the L. & N. The book value of this stock is $583,171.74, which represents the purchase price of the stock and the advances which the L. & N. made for extending the road from Millville to Versailles. I regard the $250,000 worth of stock as being worth $583,171.74. The road is operated separately and reports separately to the Auditor for taxation. The stock has never paid a dividend. There is an arrangement between the L. & N. and the Kentucky Highlands, whereby through passenger trains of the L. & N. are operated over the Kentucky Highlands, but the freight trains moving over it are all operated under the supervision of the Kentucky Highlands Railroad management, and the L. & N. Railroad pays regular tariff rate prescribed by that management.

The Nashville, Chattanooga & St. Louis Railway is organized under the laws of Tennessee. It operates from Hickman, Kentucky, and Paducah, Kentucky, on the north to Chattanooga and other points in Tennessee on the South and Memphis on the west. The N. C. & St. L. operates as lessee the road owned by the State of Georgia known as the Western & Atlantic, extending from Chattanooga to Atlanta. On June 30, 1912, the L. & N. owned $7,177,600 out of a total issue of $10,000,000, or 71.77% of its capital stock. This is a dividend paying stock, worth more than the L. & N. stock.

From an examination of my report to the Auditor of June 30, 1912, I made the statement therein that bonds owned by the Louisville & Nashville Railroad showed a valuation of $12,538,049.12. I would say that all of those bonds are good and are worth not less than the figure named.

Testimony of Geo. W. Lamb.

Geo. W. Lamb.

Geo. W. Lamb was called as a witness on behalf of the Railroad Company and testified as follows:

I am Second Assistant Comptroller of the Louisville & Nashville Railroad Company, and my duties are to assist the Comptroller in supervision and direction of all accounts, records, and statistics of the Louisville & Nashville Railroad Company. I have been connected with the Louisville & Nashville Railroad Company for
523 nearly 14 years, and have held various clerkships in the Accounting Department, occupying numerous minor positions in the Comptroller's office; was then Chief Clerk, Statistician and later Second Assistant Comptroller. My experience during the last four or five years has been devoted very largely to the preparation of statistics and investigation as to values of our properties in various states. I have for a number of years prepared reports to the Interstate Commerce Commission and to various Railroad Commissions, and it has been my duty during part of the time to prepare reports to the Auditor of Public Accounts of Kentucky and other states. I have general supervision at present of the preparation of these reports.

I have read the two notices of the tentative assessment of the franchise of the L. & N. made by the Board of Valuation and Assessment for 1913, including the one dated October 23, 1913.

I am familiar with the report of the Louisville & Nashville Railroad to the Auditor of Public Accounts as of June 30, 1912, and with the facts and figures contained in the annual report of the Louisville & Nashville to its stockholders for the fiscal year ended June 30, 1912, and with the reports of other fiscal years, and with the sources from which those reports are compiled. I personally compiled such reports for a number of years. I am also familiar with the reports made to the Interstate Commerce Commission and to the Kentucky Railroad Commission.

I will now proceed to explain various steps in the process of ascertaining the value of the franchise of the Louisville & Nashville Railroad Company assessable in Kentucky:

Method of Ascertaining Total Value of Capital Stock or of All Property, Tangible and Intangible, of the Louisville & Nashville Railroad Company.

Stock and Bond Plan.

The par value of the capital stock of the Louisville & Nashville Railroad Company during the fiscal year ending June 30, 1912, and at the end of that year was $60,000,000, during which year the average market value of the stock, per share, was $152.0825, thus making the total market value $91,249,500, according to quotations

524 on the New York Stock Exchange. These figures were arrived at by taking the highest and lowest sale price for each day having sales, then adding them all together and dividing the total by the number of quotations.

The total par value of the bonded debt outstanding as of June 30, 1912, was $136,078,500.00, and the average market value of the bonds for that year was $135,785,792.84. I arrived at this average market value by taking each series of bonds for which quotations were available, the high and low prices for each week on the New York Stock Exchange, and divided the sums of the quotations, high and low, by the number of quotations. Where no quotations were given par value was used. I file with my testimony an exhibit, marked "Geo. W. Lamb No. 1," showing the par and market values of stocks and bonds of the Louisville & Nashville Railroad for the fiscal year ending June 30, 1912, showing par value of stock $60,000,000, and par value of bonds $136,078,500; total par value of both stocks and bonds $196,078,500; and showed also market value of stocks, $91,249,500; market value of bonds $135,785,792.84; total market values of stocks and bonds $227,035,292.84.

The values of the stocks and bonds thus given include all of the property of the Louisville & Nashville Railroad Company, tangible and intangible, wherever situated, and include not only railroad mileage, but also the value of terminals and other property not represented in the operated mileage; and these values include not only the company's interest in the operated mileage of the company, but the company's interest in all mileage whether owned, leased or controlled. The total value of $227,035,292.84 includes the value of stocks owned by the Louisville & Nashville Railroad Company in other corporations which are separately taxed in Kentucky, and which pay taxes on their property, franchises and other property to the State of Kentucky, which value of stocks thus owned amounts to $30,761,795.35; that being book value, and being the value which Mr. Mapother, testifying herein, has compared with real values.

Capitalization of Income Plan.

525 I file as Exhibit Geo. W. Lamb No. 2, a statement showing capitalization of the income of the Louisville & Nashville Railroad Company for the fiscal year ending June 30, 1912, from all sources. This statement showing such capitalization at what we call composite percentage, and at 6% and at 8%. The reason I capitalized at 8% is that railroading is a hazardous undertaking, and that rate of return should be used, and is expected on business less hazardous than the railroad business. The composite percentage which I have used is 6.524%. This is arrived at by taking the L. & N. mileage in each of the States through which it operates, multiplying that by the legal rate of interest in that State, and dividing the total mileage operated into the total interest mileage, thus arriving at the figure given, to-wit, 6.624%.

Using the composite percentage of 6.524%, the total capitalization is $248,331,556.58.

Using 6%, the capitalization is $270,019,179.17.

Using 8%, the total capitalization is $202,514,384.38. The income of the L. & N. Railroad Company as shown on Exhibit No. 2, and used in making the foregoing capitalizations is $16,201,150.75. The exhibit shows how that was arrived at. The gross income is shown by the annual report to stockholders for the year ending June 30, 1912, to be $17,159,550.82. To this is added deficit from operations of the Frankfort and Cincinnati Railway, to-wit: $11,926.30, because the operations of that road are not included in the L. & N., and its mileage has been excluded from the operated mileage of the L. & N. There should also be added the income from the operations of the Georgia Railroad lease for the year ending June 30, 1912, which is credited direct to profit and loss, amounting to $68,911.08. There should also be added interest on bonds of the South and North Alabama Railroad, included in statement of income account, as a credit to interest on bonded debt, $231,400.00; also interest on bonds of the Frankfort & Cincinnati Railway not included in income account, $6,400.00, or a total addition of $318,637.38, making the total gross income $17,478,188.20. From this amount there should be deducted the net operating revenues
526 of the Elkton & Guthrie Railroad, $6,049.84, and the Glasgow Railway, $31,847.95. There should also be deducted the gross income of the South and North Alabama Railroad, included in amount of gross income shown for the L. & N. Railroad Company, $1,239,139.66, making a total deduction of $1,277,037.45, leaving a total income, as shown on my exhibit No. 2, $16,201,150.75; and that total income includes the income of certain lines, such as the Wasioto & Black Mountain, which are separately taxed.

Distribution of Values Between Kentucky and Other States.

Mileage Operated, Owned, Leased, or Controlled.

The total mileage operated, owned, leased or controlled by the Louisville & Nashville Railroad within and without Kentucky is 7,907,83 miles, of which 1,952.45 are in Kentucky, or 24.6901%. The mileage which I have just given agrees with the report of the Louisville & Nashville Railroad to its stockholders for the year ending June 30, 1912, and with the report to the Auditor of Public Accounts of Kentucky for that year, with the elimination of 40 miles of the Frankfort & Cincinnati Railway, which the Court of Appeals has held cannot be lawfully owned and operated by the Louisville & Nashville, and which is now separately operated and taxed. There was a deficit from the operation of this road for the year in question, and this deficit has not been charged against the net income stated by me. There was an income from the bonds of the Frankfort & Cincinnati Railway, which has been included in the income of the Louisville & Nashville System, stated by me.

Tangible Values Inside and Outside of Kentucky.

There is located outside of the State of Kentucky, road, equipment and other tangible property of the Louisville & Nashville Railroad amounting to $130,917,782.15, as shown by my Exhibit, Geo. W. Lamb No. 3, which is true and correct, and which I file herewith.

527 The tangible assessment of the Louisville & Nashville Railroad Company for the fiscal year in question was $28,806,072., as shown in the Auditor's notices of tentative assessments of June 28, 1913, and October 23, 1913. Assuming that this is 60% of the real value of tangible property, then the real value of tangible property of the Louisville & Nashville Railroad in Kentucky is $48,010,120. To this add the value of tangible property outside of the State of Kentucky, as shown by my exhibit Geo. W. Lamb No. 3, $130,917,782.15, we have as the value of tangible property, both in and out of Kentucky, $178,927,902.15. The deduction of $28,806,072 of tangible assessment, above mentioned, however does not include the values of the following property, which are assessed separately against their respective companies and not against the Louisville & Nashville; to-wit: Lexington & Eastern Railroad, Wasioto & Black Mountain Railroad, Morganfield & Atlanta Railroad, Madisonville, Hartford & Eastern Railroad, Kentucky Highlands Railroad, Elkton & Guthrie Railroad and Glasgow Railroad. I have prepared and file as part of my testimony marked Exhibit Geo. W. Lamb No. 4, a true and correct statement of the lines of the Louisville & Nashville Railroad within Kentucky showing assessed valuation for tangible taxes for the year 1912.

The mileage of the Wasioto & Black Mountain Railroad, the Lexington & Eastern Railroad, the Morganfield & Atlanta Railroad, the Madisonville, Hartford & Eastern Railroad, the Elkton & Guthrie Railroad and the Glasgow Railway is included in the mileage in Kentucky of 1,952.45, which I have previously stated, and the old and new part of the Kentucky Highlands Railroad is also included in the mileage in Kentucky which I have used for the Louisville & Nashville Railroad System. Dividing up the mileage of the Kentucky Highlands Railroad, the part from Millville to Versailles is 9.42 miles; that from Millville to Cliffside, 6.46 miles.

528 *Values Separately Taxed in the State of Kentucky.*

I have prepared and file as part of my testimony marked Exhibit Geo. W. Lamb No. 5, a statement truly showing the values of property separately taxed in Kentucky, which are included in the total values of the capital stock and other properties of the Louisville & Nashville Railroad Company. These values, arrived at on the stock and bond plan are $30,761,799.35. Upon the capitalization of income plan, these values are,

At composite percentage, 6.524%	$14,787,788.01
At 6 per cent	$16,079,254.83
At 8 per cent	$12,059,441.12

Ascertaining of Value of Franchise in Kentucky for Assessment for Taxation.

I file as exhibit Geo. W. Lamb No. 6, a statement showing the value of the franchise of the Louisville & Nashville Railroad, arrived at as follows, to-wit:

By deducting from the total value of all of its properties, wherever situated, as ascertained according to the stock and bond plan, the value of property separately taxed in the State of Kentucky and also the value of tangible properties within and without Kentucky, and then apportioning to Kentucky the remainder or total franchise value upon the basis of miles operated, owned, leased or controlled, and then reducing this remaining total franchise value in Kentucky to 60%, to equalize it as far as possible with the assessments made of other properties in the State of Kentucky. By this process the franchise is shown to be $2,569,586.31.

I have also prepared and file as Exhibit Geo. W. Lamb No. 7, Geo. W. Lamb No. 8, and Geo. W. Lamb No. 9, three exhibits showing the value of the franchise arrived at by capitalizing net earnings; having used composite percentage in No. 7; 6 per cent in No. 8; and 8 per cent in No. 9. The value of the franchise by these processes being as follows:

At composite percentage	$8,090,827.22
At 6 per cent	11,112,325.97
At 8 per cent	1,707,622.79

529 I have prepared and file as Exhibit Geo. W. Lamb No. 10, a statement showing the value of the franchise in Kentucky arrived at by the following process; to wit:

(1) Take the total value of the L. & N. properties everywhere of every kind;

(2) Deduct the values of properties separately taxed in the State of Kentucky;

(3) Apportion to Kentucky her share of the balance;

(4) Reduce Kentucky's part to 60 per cent thereof to equalize it with other property in Kentucky;

(5) Deduct the tangible assessment of the Louisville & Nashville in Kentucky.

The result of this process is $270,001.09.

If the values of properties separately taxed in Kentucky had been deducted after making the apportionment of the total values to Kentucky, the result would have been to show no value of the franchise at all.

I have prepared and filed as Exhibit Geo. W. Lamb Nos. 11, 12 and 13, statements showing the franchise value arrived at by the same process as that last used, except that instead of using the stock and bond plan of arriving at values, I have used the capitalization of income plan with the following results:

Using composite percentage, 6.524, the value is $5,791,242.01.

Using 6 per cent the value is $8,812,740.75.

Using 8 per cent, there is no franchise value at all.

If, in these last three statements, the value of properties separately taxed in Kentucky had been deducted after making the apportionment to Kentucky, instead of before, there would have been no franchise value at the composite percentage, or at 8 per cent, but at 6 per cent there would have been a value of $1,547,178.32.

Value of Roads Controlled, But Not Operated by the Louisville & Nashville Railroad Company.

The books of the Nashville, Chattanooga & St. Louis Railway, of the Chicago, Indianapolis & Louisville Railroad (Monon), and of the Louisville, Henderson & St. Louis Railway are not kept by the Louisville & Nashville Railroad Company or any of its
530 officers and the total assets of those roads cannot be stated from any records of the Louisville & Nashville Railroad. The general balance sheets or items of total assets of such roads which appear in Poor's Manual or any similar publications are of no service for the purpose of ascertaining the real values of those roads. General balance sheets are prepared according to the requirements of the Interstate Commerce Commisson, and as presented in publications, such as Poor's Manual, generally contain duplication of assets. I know in connection with the general balance sheets of the Louisville & Nashville Railroad Company there are many duplications of securities issued or assumed, and cash deposited with Trustees to pay maturity call bonds and other working assets and deferred debit items and contingent assets, which will aggregate nearly $35,000,000 of duplicated assets on the general balance sheet of the Louisville & Nashville Railroad Company for the year ending June 30, 1912; for example, by reference to the general balance sheet of the Louisville and Nashville Railroad Company to its stockholders for the fiscal year ended June 30, 1912, the property investments are shown as $177,000,000. Then below that are securities. Now, in an item there of $7,079,000, are securities issued or assumed, which are pledged for funded debt. The properties upon which those securities are issued are also represented in the $177,000,000 of property investment. There are securities issued or assumed held in the treasury. The properties are shown in property investment account, but these securities are not in the hands of the public, are not outstanding, but are held in the treasury, and are shown up as assets in the treasury, and are, therefore, a duplication of the assets, represented by the property investment account to that extent. (The witness proceeded to give various other illustrations of how items of assets are duplicated in a balance sheet of the character described, but that they are offset by liabilities carried on the debit side of the account.)

The values of total properties, tangible and intangible, of the Louisville & Nashville Railroad which I have given, whether on the stock and bond plan or the capitalization of income plan,
531 include the interests of the Louisville & Nashville Railroad in the Nashville, Chattanooga & St. Louis Railway, the Chicago,

Indianapolis & Louisville Railway, the South and North Alabama Railroad, the Georgia Railroad, and the Louisville, Henderson & St. Louis Railway.

I have prepared a statement which I file as Exhibit Geo. W. Lamb No. 14, which truly shows the values included in the total value of stocks and bonds of the Louisville & Nashville Railroad which are not included in the operated mileage of the Company. These values included in the total, but not included in the operated mileage, aggregate $49,715,799.56.

I have also prepared and file a-statement marked exhibit Geo. W. Lamb No. 15, showing the total values, tangible and intangible, of the operated mileage of the Company arrived at by deducting from the total value of all mileage on the stock and bond basis, the values not included in the operated mileage, which leaves, of course, the value of the operated mileage, on the stock and bond plan, which is $177,319,513.28.

Adjustment of Mileage Percentages, Because of the Fact That the Interest of the Louisville and Nashville Railroad Company in Certain Leased or Controlled Lines Does Not Represent the Full Value or Ownership Those Lines.

It would be unreasonable to apportion to Kentucky its part of the total value of properties of the Louisville & Nashville Railroad Company upon the basis of operated mileage, for the following reasons:

1. That both the amounts of income stated and the values of stocks and bonds shown in both the report to the Auditor and in the report to the stockholders, cover lines not operated as, for example, the income and the stock and bond values representing the Nashville, Chattanooga & St. Louis Railway, the Georgia Railroad and dependencies, the Chicago, Indianapolis & Louisville Railway, the Louisville, Henderson & St. Louis Railway, the Paducah & Memphis Division, and that part of the Clarksville & Princeton Branch from Gracey to Princeton.

532 2. An apportionment on the basis of operated mileage would include the mileage and results of operation of the South and North Alabama Railroad, the Glasgow Railway, the Elkton & Guthrie Railroad, and the Frankfort & Cincinnati Railway, which should not be included, as the results from the operations of these lines do not affect the tangible or intangible values of the Louisville & Nashville Railroad Company's property. The operated mileage basis would exclude results of operation of such roads as the Georgia Railroad and dependencies, which directly and intimately affect the tangible and intangible values of the Louisville & Nashville Railroad Company.

3. An apportionment on the basis of operated mileage would include property not owned in fee, such as the Southeast & St. Louis Railway, the Morganfield & Atlanta Railroad, the Madisonville, Hartford & Eastern Railroad, the Maysville & Lexington Railroad, the Owensboro & Nashville Railway, the Pine Mountain Railway, Nashville & Decatur Railroad, South & North Alabama Railroad,

Glasgow Railway, Elkton & Guthrie Railroad, and the Frankfort & Cincinnati Railway, and would exclude mileage owned in fee such as the Paducah & Memphis Division, which is operated as part of the N. C. & St. L., and that part of the Clarksville & Princeton Branch from Gracey to Princeton operated by the Illinois Central.

4. An apportionment on operated mileage basis, would result in bringing into Kentucky for taxation tangible and intangible values arising from lines and terminals owned or controlled in other States, and not represented in that mileage.

5. An apportionment on operated mileage basis would result in double taxation of roads separately taxed in the State of Kentucky, such as the Madisonville, Hartford & Eastern Railroad, the Morganfield & Atlantic Railroad, the Kentucky Highlands Railroad, the Frankfort & Cincinnati Railway, the Central Transfer Railway & Storage Company.

6. An apportionment on operated mileage would result in bringing into the State of Kentucky for taxation, and in taxing against the Louisville & Nashville Railroad Company's properties,
533 both tangible and intagible of the South & North Alabama Railroad Company, the properties of which company, both tangible and intangible, are separately taxed by the State of Alabama, in which State its properties are all situated, and in which State it alone exercises its franchise.

I have prepared and file as Exhibit Geo. W. Lamb No. 16, a statement showing the total mileage of roads operated, owned, leased or controlled both within and without the State of Kentucky, using for such roads, where the L. & N. does not own the entire interest therein, only that proportion of the mileage of the road which the L. & N.'s interest therein bears to the total interest therein, and the result as shown by this exhibit is that instead of total mileage of 7,907.83, as previously stated, the total is 6,395.22, of which there are located within Kentucky 1,811.12 miles, or 28.32 per cent.

I have also prepared and file as Exhibits Geo. W. Lamb Nos. 18, 19, and 20, statements showing the value of the franchise in Kentucky arrived at by the processes shown on those exhibits, including the use of the percentage of 28.32, as representing Kentucky's proportion of the total; that being the percentage arrived at by the calculation shown in Exhibit Geo. W. Lamb No. 16.

Report to the Kentucky Railroad Commission.

The net or gross income shown in the report made by the Louisville & Nashville Railroad Company to the Railroad Commission of Kentucky is not of any value in arriving at the values of properties, either tangible or intangible, for taxation. The statements of gross and net earnings to the Railroad Commission of Kentucky in the annual reports of this Company are of no value for assessment purposes within the State of Kentucky, for the reason that the divisions having the heaviest operating revenues, both gross and net, are interstate divisions, lying partly within and partly without the State of Kentucky. Even if the gross and net operating revenues

or expenses by operating divisions are correctly stated, it is possible to arrive — or approximate the net results for the different states
534 on interstate divisions only by an arbitrary apportionment of the results, particularly operating expense results, shown for interstate divisions. It is impossible, except upon some arbitrary plan, to ascertain the operating expenses attributable to operating revenue, and consequently net operating revenues for intrastate traffic. The value of such a statement for assessment purposes, if it has any value in such connection, depends upon the reasonableness of the arbitrary method of apportionment adopted. The difficulties indicated with respect to the ascertainment of intrastate net operating revenues are, of course, greatly magnified, if we attempted to estimate the proportion of interstate net operating revenues, apportionable to the State of Kentucky; and the estimated apportionment of interstate operating revenues, either gross or net, to the State of Kentucky, could be of no value for assessment purposes, nor could any results including such interstate results be of any value for assessment purposes.

It is not proper to use for assessment purposes the reports of net earnings or net income made to the Railroad Commission of the State of Kentucky for many reasons, among which are the following:

1. The net earnings in Kentucky shown in said annual report of the Louisville & Nashville Railroad Company to the Railroad Commission of the State of Kentucky, and particularly net operating revenue of $7,068,062.56, shown on page 93-A, under heading "traffic and mileage statistics—State of Kentucky," in said annual report to the Railroad Commission of the State of Kentucky for the year ending June 30, 1912, include the net operating revenues of lines whose values, either tangible or intangible, are not taxable against the Louisville & Nashville Railroad Company, but are separately taxed against the companies by which the properties are owned. The revenues of those roads do not accrue to the L. & N. R. Co. They are included in the report referred to, because that is an operating report, and the L. & N. operates those roads.

The amount referred to includes the net operating revenues of the Glasgow Railway, the Elkton & Guthrie Railroad, the
535 Frankfort & Cincinnati Railway, the Madisonville, Hartford & Eastern Railroad, and the Morganfield & Atlanta Railroad.

The net revenues of $7,068,062.56 include large amounts of revenue credited to the State of Kentucky originating from interstate traffic passing entirely through the State which did not originate or terminate within the State of Kentucky. An analysis was made of the report for the month of September, 1910, of the amounts of such earnings which were credited to Kentucky, that is, these earnings that pass entirely through the State, that do not originate nor terminate within the State of Kentucky. From this analysis it was ascertained that of the total interstate revenue arbitrarily apportioned for the fiscal year 1911, amounting to $15,058,583.23, there were earnings on traffic which passed through the State of Kentucky, but neither originated nor terminated in the State of Kentucky,

amounting to $6,645,832.01. This $6,645,832.01 was 44.13 of the total interstate revenues so arbitrarily apportioned. The total arbitrarily apportioned interstate revenue in Kentucky for the fiscal year ended June 30, 1912, amounted to $15,330,929.97. Assuming that the same relative proportion of such traffic passed through the State in 1912 as did in 1911, we would have for the fiscal year 1912 approximately $6,765,142.23, included in the net earnings of Kentucky, shown on page 93-A of the report to the Kentucky Railroad Commission, namely $7,068,062.56, which did not arise from the State of Kentucky, but which has arbitrarily been credited to that State.

I might say also that the operating revenues in Kentucky include revenues from express business and miscellaneous business arbitrarily apportioned without any knowledge as to the actual nature of the business, and also revenue from mail arbitrarily credited to Kentucky. I have mentioned incidentally the fact that *that* the amount arbitrarily apportioned to Kentucky in the report made to the Railroad Commission for administrative purposes includes some Ohio earnings. These are interstate earnings, they originate at Cincinnati, possibly received from connections from beyond, destined
536 very often, as through business to the South, New Orleans, that passes through the State of Kentucky. It comes in over the Newport and Cincinnati Bridge or the Chesapeake & Ohio Bridge at Cincinnati and comes down through Kentucky, or over the Kentucky Division to Atlanta. Now that revenue is all given to the State of Kentucky. A portion of it should really go to Ohio. But instead of allowing any to Ohio, the entire revenue accruing to the Cincinnati and Kentucky Divisions is given to Kentucky, both the gross and the net revenue, and there is no condition where by any analogous process the revenue is taken from Kentucky and given to some other State.

I file the following exhibits which truly show what they purport to show, to-wit:

Exhibit Geo. W. Lamb No. 21, which shows the amount of taxes paid in the State of Kentucky by the Louisville & Nashville Railroad Company per mile of road, for each of the fiscal years ending June 30, 1890 to 1912, inclusive, as compared with the taxes which would be paid for the year 1913, under the present tentative assessment. Under that tentative assessment, the taxes paid per mile of road in Kentucky would be from two to five times as great as the taxes paid per mile in previous years.

Exhibit Geo. W. Lamb No. 22, which shows in comparative form the amount of taxes paid to the State of Kentucky for each of the calendar years from 1907 to 1912, inclusive, and the estimated franchise taxes for the year 1913. The franchise taxes per mile of operated mileage, based on the tentative assessment, would be three or four times as much as the taxes per mile of operated mileage in previous years.

Exhibit Geo. W. Lamb No. 23, affords a comparison of the taxes paid per mile of road by the Louisville & Nashville Railroad Company the taxes paid by other carriers in Southern Classification

Territory for the fiscal years ending June 30, 1910 and 1911, and with taxes which would be paid by the Louisville & Nashville Railroad Company under the tentative assessment. Under the tentative assessment the taxes paid per mile by the Louisville & Nashville in Kentucky would be nearly twice as great as the taxes paid
537 per mile by the carriers in Southern Classification territory, which territory may be described generally as that south of the Ohio and Potomac Rivers and east of the Mississippi River, and which is the territory within which most of the Louisville & Nashville Lines lie, and within which lies the State of Kentucky.

Exhibit Geo. W. Lamb No. 24, affords a comparison of the taxes paid per mile of road of all steam roads in the United States with taxes paid by the Louisville & Nashville Railroad in the State of Kentucky, and taxes which would be paid by the Louisville & Nashville Railroad under the tentative assessment. This statement shows that the taxes which would be paid by the Louisville & Nashville Railroad Company under the tentative assessment would be about one-half again as large as the average payment per mile of road operated on steam roads in the United States, including the densely populated New England States and the large traffic producing states of the Central Freight Association and Trunk Line territories. The Central Freight Association territory may be described approximately as west of a line drawn from Buffalo to Pittsburgh, north of the Ohio River, taking in Illinois, Indiana, and Michigan. The Trunk Line territory may be described as that territory east of a line drawn from Buffalo to Pittsburgh, taking in Virginia, West Virginia, Pennsylvania, Maryland, New Jersey and all Eastern States.

Comparison of Real and Assessed Values.

I file as part of my testimony marked Exhibit Geo. W. Lamb No. 25, a statement showing the true and assessed valuations of real and personal property (referring to assessments for taxation) for the years 1850, 1860, 1870, 1880, 1890, as shown by the 1890 report of the United States Census, pages 14 and 59. The comparisons are for the United States as a whole and separately for the States of Kentucky, Ohio, Indiana, Illinois, Missouri, Tennessee, Virginia, and Pennsylvania. The percentages of assessed to real values for the State of Kentucky for the periods covered by this statement are as follows:

	In 1850	96.60%
	In 1860	79.30%
538	In 1870	67.77%
	In 1880	41.10%
	In 1890	46.71%

I file as Exhibit Geo. W. Lamb No. 26, which is a statement showing estimated true value of all property compared with assessed value of all property subject to ad valorem taxation in the states of Ohio, Kentucky, Indiana, Illinois, Missouri, Tennessee, Virginia and Pennsylvania, drawn from tables 15 and 16 of the Special Report of the

Census Office on Wealth, Debt and Taxation of 1907. The figures shown embrace the years 1900 and 1904; this being the latest report on Wealth, Debt and Taxation which is available.

For the year 1900, the assessed value was 47.7% of the estimated true value for Kentucky. For 1904, the assessed value was 45.9% of the estimated true value for Kentucky. This includes all forms of property subject to ad valorem taxation.

I have also prepared and file as Exhibit Geo. W. Lamb No. 27, a recapitulation or summary, showing ratios of assessed value to estimated true value of real and personal property in various States, shown by decades from 1850 to 1900, both inclusive, and for the year 1904. The authorities for the figures on this statement are pages 40 and 41 of the Special Report on Wealth, Debt and Taxation of the Census Bureau of the census of 1900, and pages 14 and 59 of Wealth, Debt and Taxation of the Census Bureau of 1890; these being the latest results which I could obtain.

I have made some comparisons between real values and assessed values in connection with the consideration of the work of the Kentucky State Board of Equalization for the year 1913, with the following results:

As shown by the original sheets of the report of the Board of Equalization for 1913, line 15, the value of tracts of lands with improvements, equalized value, is shown as $355,285,669.00. As shown by the Thirteenth Census of the United States (1910), the real value was $635,459,372.00, made up as follows:

Value of farm lands	$484,464,617
Value of Buildings	150,994,755

This refers, of course, to Kentucky. From these figures
539 it will be seen that the percentage of equalized value to real value is 55.9%.

In case of live stock the equalized value, as shown in the 1913 report of the Kentucky Board of Equalization, amounted to $57,318,478, whereas the real value of live stock in Kentucky as shown by the Thirteenth Census of the United States, was $117,486,662.00; the percentage of equalized value to real value being 48.8%.

In the case of agricultural implements, vehicles, carriages, bicycles &c., as shown by items 45 and 49 of the report of the Kentucky Board of Equalization for 1913, the equalized value of these items is $8,921,889.00; whereas the real value of these articles in Kentucky, as shown by the Thirteenth Census of the United States, is $20,851,846.00; the percentage of equalized to real value being 42.8%.

In the foregoing comparison between real values, as shown in the United States Census, and the assessed values, as shown by the report of the Kentucky Board of Equalization, I have used the real values as given in the Census of 1910, and have compared these with the assessed values in the report of the Board of Equalization for 1913. Of course, it is to be presumed, and it is true, that the real values were greater in 1913 than they were in 1910, so that, if the facts could

have been obtained as to the real values for 1913, the result would have been to reduce the percentage of assessed to real values.

(Here the testimony of Mr. Lamb was temporarily suspended.)

Affidavits.

At this point various affidavits of witnesses from various counties in the State as to the percentage of assessed values to real values of property in their respective counties were read by the railroad company before the Board, but these will be referred to later.

There was also here read by the Railroad Company before the Board, a communication from G. B. Likens, Assistant Auditor of Public Accounts of the State of Kentucky, to H. L. Stone, General Counsel of the Louisville & Nashville Railroad Company, to-wit:

Statement From Ass't Auditor as to Assessed Values.

"State of Kentucky,
Office of Auditor of Public Accounts,
Frankfort.

540 November 15, 1913.

Col. H. L. Stone, General Counsel L. & N. R. R. Co., Louisville, Ky.

DEAR SIR: Referring to your letter of the 12th., I herewith enclose copy of the statement made by the Board of Equalization to appear in front part of the report.

(2) The assessed value of lands, city and town lots, together with all other property equalized and assessed for taxation as appears in the recapitulation sheets, $837,098,855.00.

The equalized value of the same is $851,550,237.00, or a general raise of $14,451,382.00.

(3) The amount of all property including railroads, franchises of public service corporations and banks, I have been unable to get ready. This is not a part of the report of the Board of Equalization but the information is to be obtained from two or more departments of this office. This data is not at present in a condensed form so as to furnish it without considerable tabulation. We have a clerk working on it and hope to have it ready for you Monday morning.

Am not sure this is just what you want, but if we can give you any additional information, we will be glad to do it.

Yours very truly,

G. B. LIKENS,
Assistant Auditor."

Statement From Corporation Dep't as to Assessed Values of Corporate Property.

There was also read in evidence the following communication from Charles J. Veling, Chief Clerk of the Corporation Department

in the office of the Auditor of Public Accounts, to H. L. Stone, General Counsel of the Louisville & Nashville Railroad Company, to-wit:

"State of Kentucky,
Office of Auditor of Public Accounts,
Frankfort.

November 20th, 1913.

541 Col. H. L. Stone, L. & N. R. R. Co.

DEAR SIR: In compliance with your request as mentioned in your letter to Mr. Likens, the following is part of the information desired by you.

Total assessed value of R. R. as made by the Board of Valuation and Assessment for 1913 taxes	$168,436,200
Only tentatively assessed	147,400,000
Finally assessed and Paid	21,036,200

Miscellaneous Corporations:

Finally assessed and paid on valuations	26,576,400
Tentatively assessed	5,000,000
National Banks assessed and Paid on	11,000,000
State Banks	23,500,000
Total assessed value for 1913, taxes on Banks, Railroads and other public service corporations, this does not include any license tax of any description.....	$234,512,600.

Respectfully,

CHAS. J. VELING,
Chief Clerk Corp. Dep't.

Supplemental Statement.

Value of Distilled Spirits for taxing year 1913—$38,832,984."

Reports of Board of Equalization.

The Railroad Company also read in evidence the following reports of the State Board of Equalization to the Governor of Kentucky, to-wit:

542 1910.

"Honorable Augustus E. Willson, Governor of Kentucky, Frankfort, Kentucky.

SIR: "The State Board of Equalization respectfully submits the following report for the year 1910.

"The revenue laws provide that all property shall be assessed at its fair cash value. It was not contended that this was done in a

single county; therefore, the Board of Equalization was not privileged to reduce any returned assessment.

"We selected those counties that most nearly conformed to the requirements of the law and endeavored to equalize the others with them. We do not claim that there was a perfect adjustment of values, but a majority of the Board gave a careful investigation and equalized property as nearly as possible with scant evidence and under an imperfect law. The conditions under which we worked were not favorable for accuracy. The assessment of the State, as a rule, was bad.

"There are very few capable assessors in the State, and the failure of most of them to acquaint themselves or comply with the mandatory provisions of the revenue laws was one of the chief difficulties. We had to contend with slovenness, ignorance and duplicity. The transfer sheets which were sent to us as an exhibit were often misleading; the purchase price of the property was hidden by '$1.00 and other considerations'; in violation of law 'listed with other lands'; transferred property was assessed at a greater percentage than property not transferred, and in many instances where the sale value was given the assessed and supervisors' value was withheld, thus preventing a comparison and defeating one of the principal purposes of the law.

543 "The witnesses that appeared before the Board were selected by the county judges of the various counties; naturally they were not chosen to give information detrimental to their county assessment, but usually to defend it, however bad. In many instances the testimony showed that the assessors accepted the values as given by the property owners, and the County Board of Supervisors made no material change. We recall one instance in which the County Board of Supervisors reduced the real property $121,400.00, which was lower than the property-holders themselves had given in their property for assessment.

"The law requires that the correctness of the transfer sheets—which is the first evidence submitted to this Board—shall be verified by the county judge and the county attorney. It is not an exceptional case where it is admitted by both that they had signed in a perfunctory manner, without any character of investigation, and a chairman of a County Board of Supervisors testified that he had never seen the transfer sheets.

"The intangible property, which we are not privileged under the law to change—a schedule of which is given the Board to indicate the tendency of the assessment—shows beyond question that ninety per cent of that character of property escapes taxation, and in one instance, where the amount is approximately known to be an asset of $6,000,000, it is returned $28,500, being 43/100 of one per cent.

"The chief plea as an objection to an increase is the lack of uniformity of assessment, and that an increase would work a hardship on the poorer people in the community whose property was assessed at a greater percentage of value than their wealthy neighbors, which, if true, the Board of County Supervisors is alone blameable.

"The increase made by the State Board of Equalization average

8 per cent, and, with this addition, is no measure of the
544 cash value of the property in the State..

"Attest:

W. S. CARVER,
Chief Secretary.

JOHN E. GARNER, *Chairman.*
F. P. JAMES.
C. H. HATCHETT.
J. T. EARLE.
W. R. WATERS.
EDGAR RENSHAW.
JNO. W. LEWIS."

"FRANKFORT, KY., May 31, 1911.

"Honorable Augustus E. Willson, Governor of Kentucky, Frankfort, Kentucky.

SIR: "The State Board of Equalization and Assessment respectfully submits the following report for the year 1911.

"In this, as in former years, there was no occasion for reducing any county's returned assessment. Not one of them was assessed at a measure of its fair cash value. Forty-seven counties were not changed—not for the reason that the Board considered them properly assessed, but because, if they were increased, the counties that had a per cent added would have to have been raised correspondingly higher.

"The law governing the Board has not been changed in any particular during your administration. The Legislature has not seen fit to make an addition or change which would enable the Board to more probably arrive at an accurate conclusion in its endeavor to equalize values among the counties.

545 "The transfer sheets upon which we are to primarily base our decision, as they are at present returned, are in most cases almost worthless; some for the reason that the purchase price is purposely hidden under '$1.00 and other considerations'; many have no value fixed by the county supervisors; some have no value fixed by the assessor; much is 'listed with other property'; in numbers of instances the acreage is not given; in nearly all some one term is withheld, which makes a comparison between the sale value, assessed value and Supervisor's value impossible. In many cases it is a result of ignorance, carelessness or slovenness; in others, shrewdness and duplicity—done purposely to mislead. When witnesses are sent, they oftener serve to confuse than otherwise. All witnesses who appear before the Board are appointed by the County Judge after he has received notice of a tentative raise by the Board. It is seldom that the judge will select a witness who has not formed an opinion and expressed a desire to appear in defense of his county. All the evidence before the Board is ex parte. The record is made up by the county officials and all witnesses selected for the purpose of testifying for the defense.

"There are a few good assessors in the State—we say a 'few' for the lack of a general term that expresses a lesser number.

"The impression seems to be gaining ground throughout the State that we have a 'single tax' system, and that personal property is exempt from taxation, and, inasmuch as real estate is compelled to bear the burden, it is the privilege of the owner and the duty of the officials to connive to list all property at a very low figure. In the matter of personal property no witness testified that the assessor claimed to have assessed it fully, or that the owners had intended to give it in at its worth. In substance, they contend that it is not given in anywhere, and excuse themselves on the ground that it is a matter of perjury or poverty, and exercise their right of choice.

546 "The result is that after the number of lists that the assessor arbitrarily increases is added to the number that the County Board of Supervisors raise, there remains about 95 per cent of the people in the State who fix the sum themselves upon which they are willing to pay taxes, and it is a safe assertion that 99 per cent of that 95 per cent are not inclined to pay a great amount.

"From the testimony of the average witness who appears before this Board, there is very little good land in his section of the State, and what is there is mainly in adjoining counties; in his particular county there is a poor streak extending the length and width of the county from which all the timber has been cut and marketed; the process of erosion has carried all the fertile soil into the Gulf of Mexico; that a peculiar and unprecedented condition exists in regard to the bottom lands in his county, unlike the conditions along most streams that enrich the land, but the current of the stream changes and washes it away, and if by accident there is a deposit, it is always of sand, that destroys its future productiveness; that there is here and there an occasional oasis of small area upon which the tireless farmer can eke out an existence, and, by the addition of a small mortgage, pay his taxes.

"The cities do not labor under exactly the same difficulties, but their difficulties are just as difficult. It seems that in all the cities the railroads have secured quantities of land for terminal facilities that are withheld from assessment; in addition to which, the smoke, noise and dust has destroyed the value of property for blocks on either side. Schools and churches have also acquired valuable property which is exempt from taxation; this also lessens their total. The money in banks is owned by non-residents, country banks and the Federal Government. The remaining few dollars left among their citizens is mainly for the purpose of street car fare. Business has been removed from the principal streets and is yet un-

547 located. In fact, the city would go into the hands of a receiver if there were anything to receive or anybody who would receive it.

"Many counties insist that any increase in their present assessment would impoverish them; possibly this complaint has been loudest from the pauper counties that are a liability of the State—that not only expend every dollar collected for taxes in their own county, but are beneficiaries from the State of many thousand dollars each year.

"The final action of this Board has been reported to the Auditor, and, while not claiming that it is infallible, it is the result of arduous work and unprejudiced judgment.

"Respectively submitted,

JOHN E. GARNER, *Chairman.*
C. H. HATCHETT.
J. T. EARLE.
F. P. JAMES.
W. R. WATERS.
EDGAR RENSHAW.
I. G. MASON.
JNO. W. LEWIS.

"Attest:
W. S. CARVER,
Chief Secretary."

"Hon. James B. McCreary, Governor of Kentucky.

"SIR: Your State Board of Equalization respectfully submits herewith its report for 1912.

"This body has been in session continuously from February 10th to this date, May 31, 1912, and within that time has heard delegations from nearly every county in the State.

"Our figures for this year show a decrease in the total assess-
548 ments on real and personal property. We made raises only where a great falling off was shown in assessment as compared with the preceding year, it being the policy of the Board not to increase arbitrarily the assessment of any county.

"This Board has endeavored at all times to be fair in its deliberations, and has, as far as possible, tried to satisfy the various representatives who have appeared before it to protest against a raise in assessment; yet it has not, at any time, overlooked its duty to the State of Kentucky.

"We have raised the assessment of about fifty per cent of the counties in the State, and the action of the State Board of Equalization for this year on all classes of property is shown in the various tabulated statements compiled by our secretaries and transmitted herewith.

"Respectfully submitted,

M. J. MEAGHER, *Chairman.*
EDGAR RENSHAW.
J. T. PENICK.
JOHN W. LEWIS.
T. P. CRAIG.
J. T. EARLE.
J. P. HOWES.

"Attest:
VICTOR V. PACKWOOD,
Chief Secretary."

"FRANKFORT, KY., May 31, 1913.

"Hon. Jas. B. McCreary, Governor of Kentucky.

"SIR: This Board met February 10th (time specified by law) and will adjourn today, May 31st.

"When the secretaries had gone over the recapitulation sheets and transfer, we took up the counties of the 7 Appellate Districts and passed preliminarily upon them; we set days for hearing the witnesses from each county.

549 "We, in every county, notified the county judge of our preliminary action; in a number of counties the judge accepted our preliminary work and it became final. We made raises in a majority of the counties, in several of them, not as much as should have been, but on account of the disastrous floods that visited them, we thought best not.

"We made no arbitrary raise, in every instance the facts authorized us.

"We want to compliment the county judges of Kentucky on the delegations sent before this Board. We found them to be gentlemen. While at all times remembering our duty to the State we have tried to make it pleasant for the gentlemen before us; with a few exceptions, so very few we may call it unanimous, the county delegations before our Board have gone away satisfied, in a good humor, acknowledging that our final action was just to them and the State of Kentucky.

"We believe that the work done this year will be fruitful, that next year the counties throughout the State will send better assessments.

"Respectfully,

Officers.

Chairman:	Secretaries:
HON. M. J. MEAGHER.	WILL P. WALKER. JAS. H. DALE. ROWAN SAUFLEY.

Members.

First District: Edgar Renshaw, Hopkinsville.
Second District: R. G. Cary, Calhoun.
Third District: John W. Lewis, Springfield.
Fourth District: Thos. P. Craig, Louisville.
Fifth District: M. J. Meagher, Frankfort.
Sixth District: J. T. Earle, Covington.
Seventh District: J. F. Howes, Paintsville."

550 *Total Assessed Values in Kentucky for* 1910, 1911, & 1912, *as Shown by Board of Equalization Reports.*

Complainant here read into the record the following extracts from the reports of the Boards of Equalization of Kentucky for the years 1910, 1911 and 1912, towit:

1910.

Grand total value of all property as assessed for taxation	$767,016,596.00
Grand total value of all property as equalized for taxation	$828,275,022.00

1911.

Grand total value of all property as assessed for taxation	$816,085,240.00
Grant total value of all property as equalized for taxation	$846,454,020.00

1912.

Grand total value of all property as assessed for taxation	$824,763,252.00
Grand total value of all property as equalized for taxation	$840,479,194.00

551 *Testimony of Geo. W. Lamb Continued.*

Explanation of So-called Affidavit of Milton H. Smith.

Witness Geo. W. Lamb continuing:

In its notice of tentative assessment of October 23, 1913, the Board makes reference to what it calls an affidavit of Milton H. Smith, President of the Louisville & Nashville Railroad Company, said to have been filed in the case of Louisville & Nashville Railroad Company vs. Siler, et al., I presume the affidavit of Mr. Smith here referred to is his verification of the bill of complaint in the case against Commissioners Siler, McChord and Ferguson, cons-ituting the Railroad Commission of Kentucky.

It was here stated by the Board and its counsel that this is what was referred to as Mr. Smith's affidavit, and it was agreed that the particular part of the bill referred to was paragraph XIV thereof, which is as follows:

"Paragraph XIV of the bill of complaint in the case of Louisville & Nashville Railroad Company versus Charles C. McChord, Adam T. Siler and McDougal Ferguson, as constituting the Railroad Commission of the State of Kentucky.

In the Circuit Court of the United States for the Eastern Judicial District of Ky.

Complainant states that the evidence in said investigation showed the following values and facts, to-wit:

Valuation No. 1.

Total capital stock of Louisville & Nashville Railroad Company, par value	$60,000,000.00
Total of its bonded Indebtedness	114,440,500.00
Aggregate par value of capital stock and bonds	$174,440,500.00
Kentucky's share of the par value of the stock and bonds on basis of mileage operated (30.85%)	$53,814,894.25
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	16,257,479.55

552

Kentucky's share of the par value of the stock and bonds on the basis of the proportion the gross earnings in Kentucky bears to the gross earnings of the entire system (37.94%)	$66,182,725.70
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	19,993,801.43

Valuation No. 2.

Total average mean daily market price of stock on the New York Stock Exchange during the fiscal year ended June 30, 1905 (134.91 per share)	80,948,400.00
Par Value of bonds	114,440,500.00
Total	$195,388,900.00
Kentucky's share of this value of the stock and bonds on the basis of mileage operated (30.85%)	60,277,475.65
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	18,209,825.39
Kentucky's share of the market value of the stock and par value of the bonds on the basis of the proportion the gross earnings in Kentucky bears to the gross earnings of the entire system (37.94%)	74,130,548.66
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%)	22,394,838.75

Valuation No. 3.

The highest market value of the stock as of June 30, 1905, based on the highest quotation on that date on the New York Stock Exchange ($149.75 per share)	$89,850,000.	
The par value of the bonds.....	114,440,500.	
Total of highest market value of stock on June 30, 1905, and par value of bonds...		$204,290,500.00
Kentucky's share of this value based on the mileage operated (30.85%).....		63,023,619.00
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%).....		19,039,435.00
Kentucky's share of the highest market value of the stock on June 30, 1905, and par value of the bonds on the basis of the proportion the gross earnings of the entire system (37.94%).....		77,507,815.70
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%).....		23,415,111.12

Valuation No. 4.

Cost of all the railroads of the Louisville & Nash-		
553		
ville Railroad Company in Kentucky as shown by the books.....		$57,097,232.53
The value of equipment in Kentucky based on the mileage made by the different classes of equipment (locomotives, passenger cars, and freight cars), over the lines in Kentucky as compared with the total mileage made by such equipment over the entire system.....		10,826,668.77
Total value based on cost of road and value of equipment.....		$67,923,901.30
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%).....		20,519,810.58

Valuation No. 5.

The value of the railroads of the Louisville & Nashville Railroad Company in Kentucky based on the cost of reproduction.....	$59,772,816.04	
The value of equipment in Kentucky based on the mileage made over the lines in Kentucky as compared with the mileage made by the different classes of equipment over the lines of the entire system....	$10,826,668.77	
Total value based on cost of reproduction		$70,599,484.81
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all busines in that State (30.21%).....		21,328,104.36

Valuation No. 6.

Kentucky's share of the par value of the capital stock of the Louisville & Nashville Railroad Company, ($60,000,000.00) on the basis the operated mileage in that State bears to the operated mileage of the entire system (30.85%)	$18,510,000.00	
Kentucky's share of the par value of the bonds secured by mortgages on the lines in that State and of other bonds equitably apportioned to those lines....	48,966,691.53	
Total of Kentucky's share of stock and bonds on this basis		$67,476,691.53
The proportion of this value devoted to intrastate business in Kentucky on the basis of the proportion the gross earnings on intrastate traffic bears to the gross earnings on all business in that State (30.21%).....		20,384,708.51

554 The following additional portions of the bill of complaint in the case of Louisville & Nashville Railroad Company vs. Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually, and as constituting the Railroad Commission of the

State of Kentucky, filed in the Circuit Court of the United States for the Eastern Judicial District of Kentucky on or about July 26th, 1906, were offered and filed in evidence by the defendants in this case:

In the Circuit Court of the United States for the Eastern Judicial District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
CHARLES C. MCCHORD, ADAM T. SILER and MCDOUGAL FERGUSON, Individually and as Constituting the Railroad Commission of the State of Kentucky, Defendants.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the Eastern Judicial District of Kentucky.

The complainant, Louisville & Nashville Railroad Company, states it is a corporation duly created, chartered, organized and existing under the laws of the State of Kentucky, having its principal office and place of business in the city of Louisville, Jefferson County, Kentucky; that it is a citizen and resident of said State, and by virtue of its charter and the amendments thereto, it has and had at the dates hereinafter mentioned, the power to sue and be sued, contract and be contracted with, and to construct, own, lease, control, maintain and operate steam railroads in the State of Kentucky and other States as a common carrier of intrastate and interstate freight and passengers; and it brings this, its bill of complaint against the defendants, Charles C. McChord, Adam T. Siler, and McDougal Ferguson, individually, and as constituting the Railroad Commission of the State of Kentucky, who are citizens and residents of said State. The defendant Adam T. Siler is an inhabitant of the Eastern Judicial District, and the defendants Charles C. McChord and
555 McDougal Ferguson are inhabitants of the Western Judicial District of Kentucky. And the said defendants are the duly elected, qualified and acting members of and constitute the railroad Commission of the State of Kentucky, the principal office of which Commission is fixed by law at Frankfort, the seat of government of said State, in the Eastern Judicial District of Kentucky, whereof the defendants as and constituting said Commission are all inhabitants.

I.

The complainant was incorporated and organized under an act of the General Assembly of the Commonwealth of Kentucky, entitled "An Act to Charter the Louisville & Nashville Railroad Company" approved March 5, 1850, whereby complainant was authorized to construct and operate a railroad from Louisville, Kentucky, to the State line in the direction of Nashville, Tennessee. There-

after said charter was amended by an act of said General Assembly, approved March 20, 1851, and by its said charter as thus amended complainant was authorized to construct and operate a branch of its railroad to the Mississippi River, and any other branches it might desire. Again its charter was amended by an act of said General Assembly, approved January 17, 1856, and by its charter as thus amended complainant was authorized to purchase and hold any railroad constructed by any other company. Its said charter was amended by divers other acts of said General Assembly, and by virtue of its charter as thus amended from time to time, and upon the faith thereof, complainant has constructed, purchased and acquired, and now owns, holds and operates the following railroads within the state of Kentucky:

	Miles.
Main Stem, from Louisville to the Tennessee State Line, constructed about 1859	139.88
Bardstown Branch, from Bardstown Junction, on Main Stem, to Bardstown, acquired about 1860, and Springfield Branch, from Bardstown to Springfield, acquired about 1889, and together constituting the Bardstown & Springfield Branch	37.44

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Bloomfield Branch, from Shelbyville to Bloomfield, acquired September 28, 1901	26.72
Cincinnati Division, from Louisville to Newport, acquired about 1881	113.83
Clarksville & Princeton Branch, from Gracey to Tennessee State line, in the direction of Clarksville, Tennessee, acquired about 1886	23.17
(That portion of this branch between Gracey and Princeton, acquired about the same time, 20.70 miles, is operated by the Illinois Central Railroad Company under a lease made to the Ohio Valley Railway Company.)	
Greensburg Branch, from Lebanon on the Knoxville Branch to Greensburg, acquired August 3, 1903	30.90
Cumberland Valley Division, from Corbin on the Knoxville Branch, to the Tennessee State Line at Cumberland Gap, constructed about 1890	47.12
Chenoa Branch, from Cumberland River and Tennessee Railroad Junction, on the Cumberland Valley Division, to Chenoa, acquired September 28, 1901	12.35
Elkton & Guthrie Railroad Branch, from Elkton Junction to Elkton, operated under lease from the owners, dated December 1, 1904	10.92
Glasgow Railway Branch, from Glasgow Junction, on Main Stem, to Glasgow, operated under lease from the owners, commencing in 1897	10.50
Henderson Division, from Guthrie, on Memphis Line, to Henderson	97.76 miles

and Madisonville & Providence Branch, from Madisonville, on the Henderson Division, to Providence	16.10 miles	
acquired about 1879; total.....		113.86
Kentucky Central Division, Main Line, from Covington to Sinks, a point near Livingston, on the Knoxville Branch..	149.88 miles	
Lexington & Paris Branch, from Lexington to Paris	17.86 miles	
Paris & Maysville Branch, from Paris to Maysville	49.48 miles	
Richmond Branch, from a point near Richmond to Rowland, on the Knoxville Branch	30.43 miles	
all acquired September 26, 1891; total..		247.65
Knoxville Branch, from Lebanon Junction on the Main Stem, to the Tennessee State Line at Jellico, constructed at different times and completed about 1882.....		171.17
Jellico, Birdeye & Northern Branch, or Halsey Branch, from Jellico to Halsey, acquired July 16, 1902.....		7.79
Knoxville, La Follette & Jellico Division, from Saxton, to Tennessee State Line, acquired January 1, 1905.....		3.73
Lexington Branch, from LaGrange on the Cincinnati Division, to Lexington, acquired about 1881.....		67.00
Shelby cut-off from Christiansburg on the Lexington Branch to Shelbyville, constructed about 1895.....		8.51
Louisville, Harrod's Creek & Westport Branch, from First and Water streets, in Louisville, to Pipe Line Avenue, near the Louisville Waterworks, acquired about 1881..		3.46
(The remainder of this branch, from Pipe Line Avenue to Prospect, acquired at the same time, has been sold and conveyed to the Louisville & Interurban Railway Company, but is operated by complainant for freight purposes)		7.70
Memphis Line, from Memphis Junction, on the Main Stem, to the Tennessee State Line at Guthrie, constructed about 1859		46.46
Middlesborough Railroad, consisting of tracks around Middlesborough, and extending therefrom to the Ten-		

nessee State Line, acquired about 1897.....		16.02
Owensboro & Nashville Division, from Owensboro to Adairville, 83.46 miles, with a branch from Penrod to Mud River, 4.64, miles, acquired about 1880, total...		88.10
Shelby Branch, from Anchorage, on the Cincinnati Division, to Shelbyville, acquired about 1881.....		19.10
Wilton Branch, from Wilton Junction, on the Knoxville Branch, to Lorena, constructed about 1901.....		4.41

Complainant also constructed, about 1903, and operates the Brush Creek Branch, from Brush Creek on the Kentucky Central Division, to Johnetta	4.85
Complainant further states that it owns the Newport and Cincinnati Bridge, and operates the railroad tracks connected therewith from Newport to the Ohio State Line, acquired in June 1904	.54
Complainant also leased in 1902, and operates over the tracks of the Henderson Bridge & Railroad Company, formerly the Henderson Bridge Company, in and from Henderson to the Indiana State line	.47
Under trackage arrangements, acquired September 26, 1891, complainant operates over the tracks of the Covington & Cincinnati Elevated Railroad & Transfer and Bridge Company, from Covington to the Ohio State Line	1.58
The total mileage of said railroad owned or leased and operated by the complainant in Kentucky for each of the fiscal years ended June 30, 1905, and June 30, 1906, was	1,265.23
In addition to the foregoing mileage of railroads complainant owns, but does not operate, the Paducah & Memphis Division, acquired about 1897, which is leased to and operated by the Nashville, Chattanooga & St. Louis Railway, the portion of said division situated in Kentucky being	49.40

The said railroads so described within the State of Kentucky are parts of through lines of railroad operated by complainant. The Main Stem extends from Louisville to Nashville, Tennessee, and thence southwardly to Decatur, Birmingham, Montgomery, and Mobile, Alabama, Pensacola, Florida, and through Mississippi, to New Orleans, Louisiana. The Henderson Division extends from Nashville, Tennessee, through Guthrie and Henderson Kentucky, to Evansville, Indiana, where it connects with complainant's St. Louis Division, extending through Indiana and Illinois to St. Louis, Missouri. The Cincinnati Division extends from Newport to Cincinnati, Ohio, and the Kentucky Central Division extends from Covington to Cincinnati, Ohio. The Kentucky Central Division also connects with the Knoxville Branch, which at Corbin connects with the Cumberland Valley Division, which extends to Big
558 Stone Gap and Norton, Virginia. The Knoxville Branch extends to Jellico and Knoxville, Tennessee, thence by the lines of complainant to Atlanta, Georgia, and Murphy, North Carolina. The Memphis Line extends from Guthrie southwestwardly to Memphis, Tennessee; and at all terminal points of complainant's railroads, and at many other points, both in and out of Kentucky, complainant's lines of railroad make connections with other railroads, whereby there can be and is carried on through bills of lading, freight between points in Kentucky and all parts of the United States. Complainant's system of railroads owned or leased,

and operated by complainant, of which those in Kentucky, above described, are an integral part, contained 4,101.05 miles for the fiscal year ended June 30, 1905, and now contains an operated mileage of 4,290.08 in and out of Kentucky, and said system extends into, reaches and traverses thirteen States, viz: Missouri, Illinois, Indiana, Ohio, Kentucky, Tennessee, Virginia, North Carolina, Georgia, Alabama, Florida, Mississippi and Louisiana. Complainant carries and has for many years carried a large traffic over its lines located in Kentucky, both freight and passenger, and both intrastate and interstate, about seventy (70%) per cent. of such traffic transported over its lines in Kentucky in the fiscal year ended June 30, 1905, in prior years, and since, being strictly interstate traffic, and much of the remainder being virtually interstate traffic, the rates upon which having a direct and vital connection with the rates on interstate traffic, and a far-reaching effect and influence upon commerce between the several states.

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XIII.

Complainant states that in the written questions propounded to it by said Commission during said investigation, complainant was requested to furnish statements showing the actual amount of freight and passenger traffic in Kentucky, both intrastate and interstate, the receipts, cost of operation, and all other operating statistics, for the year ended June 30, 1905. To have furnished this information would have caused a delay of nearly twelve months, and involved a large amount of labor and the expenditure of a large sum. It was, therefore, agreed between complainant's representatives, said Commission and the complainants in said proceeding, that four representative months of said fiscal year, viz: September and December, 1904, and March and June, 1905, should be taken, and that the information called for should be estimated for said entire fiscal year upon the basis of the actual results ascertained by an examination of the original way-bills, as well as the books, accounts, etc., for the four months so selected. By this method it was shown that the results of operating complainant's lines of railroad in Kentucky for the fiscal year ended June 30, 1905, on both intrastate and interstate business or traffic were as follows:

Gross earnings		$14,643,073.42
Operating expenses 69.16%, or	$10,127,125.78	
Taxes 3.42%	500,752.75	
Total		10,627,878.53
Per cent. of operating expenses and taxes to gross earnings		72.58%
Of the entire business done in Kentucky 30.21% was intrastate business, making		4,424,235.77

This intrastate business in Kentucky was composed of the following items, to-wit:

Passenger	$1,387,554.91	
Express	170,384.46	
Excess baggage and storage	38,262.84	
Mails	163,980.35	
Other items	3,590.13	
Total passenger traffic		1,763,772.69
Freight	$2,552,273.62	
Other earnings from operation	108,189.46	
Total freight traffic		2,660,463.08
Aggregate passenger and freight earnings		$4,424,235.77

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Assuming that the cost or operating expenses for doing intrastate business was no greater proportionately than the general cost of operating expenses for doing the entire business in Kentucky, the proportion of operating expenses, including taxes (72.58%) chargeable to intrastate business was	$3,211,110.32
On this basis the net earnings from intrastate business in Kentucky were	$1,213,125.45
Proportion of net freight earnings to total net earnings (57.69%)	699,852.07
Proportion of passenger, express, excess baggage and storage mail and other net earnings from operation (outside of freight proper) to total net earnings (42.31%)	513,273.38
Average gross amount, received for each ton of intrastate freight	$1.28
Average distance hauled of each ton of intrastate freight	97.96 miles
Average receipts on intrastate freight per ton per mile	1.307 cents
Average gross earnings intrastate freight per mile in Kentucky	2,017.24
Average gross earnings on intrastate passenger and freight per mile in Kentucky	3,496.78
Average gross amount received for each ton of interstate freight in Kentucky	$1.129
Average distance hauled in Kentucky of each ton of interstate freight	142.82 miles

State, county and municipal taxes actually paid on railroad property and franchises in Kentucky in the fiscal year ended June 30, 1905	$491,332.86	
Such taxes accrued in excess of the amount paid within said fiscal year	9,419.89	
Total taxes		**500,752.75**

Fixed charges paid for interest on bonds.....	$5,179,414.68
Total mileage operated in said fiscal year by Louisville & Nashville Railroad Company in its entire system	4,101.05
Proportion of total mileage in Kentucky (1,265.23) to total mileage in entire system.....	30.85%
Gross earnings, intrastate and interstate of entire system	38,599,660.26
Proportion of gross earnings in Kentucky to gross earnings of entire system.....	37.94%.

561 XXVII.

Complainant further states that this is a suit in equity of a civil nature; that the matter in dispute far exceeds, exclusive of interest and costs, the sum or value of Two Thousand ($2,000) Dollars; that this cause is a suit arising under the Constitution of the United States, to-wit: Section four (4), Article four (4), Articles five (5) and eight (8), and Section one (1) of Article fourteen (14) of the amendments to said Constitution.

In consideration whereof and for as much as complainant is remediless in the premises at law, or under the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end that the defendants hereinafter named may answer the several matters and things hereinbefore set forth as fully and particularly as if the same were again herein repeated and they were thereunto interrogated, complainant prays that an injunction may issue out of this court, restraining and enjoining the defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, and each of them, individually, and jointly as constituting the Railroad Commission of the State of Kentucky, from continuing said order of June 20, 1906, mailed to and received by complainant's said District Attorney on July 20, 1906, or putting the same into force and effect on July 29, 1906, or at any time thereafter, so far as it relates to the lines of railroad operated by complainant in the State of Kentucky, or either of them; also restraining and enjoining said defendants, and each of them individually, and jointly as constituting said Railroad Commission, to revoke and cancel said order and the schedule of maximum rates prepared thereunder, so far as they relate to complainant's lines of railroad; also restraining and enjoining said defendants, and each of them individually, and jointly as constituting said Railroad Commission, from recommending or causing to be instituted any prosecution by indictment, or other-

562 wise, against complainant, or any of its officers, agents or employes, to recover any fine or penalty imposed by the McChord Act, for or on account of complainant's failure or refusal to put into force or effect on either or any of its lines of railroad in the State of Kentucky, under protest or otherwise, said Commission's order promulgated July 20, 1906, or the rates fixed in the schedule of maximum rates prepared thereunder;

And that, in the meantime, and until a decision can be had upon complainant's motion for the injunction herein prayed for, a restraining order be granted immediately, restraining the acts sought herein to be enjoined, complainant hereby averring that there is danger of irreparable injury from delay, if action should not be taken until said motion for an injunction be heard and determined.

That a writ of injunction be issued, commanding and enjoining the defendants as above prayed for, and, on final hearing, that said injunction as herein prayed for be made perpetual; that said order of June 20, 1906, promulgated July 20, 1906, and the schedule of maximum rates prepared by said Commission thereunder, so far as the same is made applicable to complainant, or either or any of its railroads in Kentucky, be declared null and void by decree of this court; and that a mandatory injunction be issued, commanding the said defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, constituting said Commission, to recall, revoke and abolish said order and schedule of maximum rates, so far as complainant and its railroads in the State of Kentucky are concerned; and that the said McChord Act be declared and adjudged by decree of this court to be in violation of the Constitution of the State of Kentucky, and the Constitution of the United States, and, therefore, invalid, null and void.

And that complainant may have such other and further relief as in equity it may appear to be entitled to.

May it please your Honors to grant unto complainant the temporary restraining order aforesaid, the writ of injunction
563 aforesaid, and the writ of subpœna against said defendants, Charles C. McChord, Adam T. Siler and McDougal Ferguson, individually, and as constituting the Railroad Commission of the State of Kentucky, commanding said defendants, under penalty to be therein fixed, to appear in this court on some certain day to be therein named, and to answer the premises and abide by and perform such decree as may be passed herein, but, to relieve complainant of an undue burden of proof, said answer will not be made under oath, as an answer under oath is expressly waived.

This is the first and only application for a restraining order or an injunction in this case.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.
By THOMAS B. HARRISON, JR.,
District Attorney.
HENRY L. STONE,
General Counsel for Complainant.

STATE OF KENTUCKY,
Jefferson County, set:

Personally appeared before me, George E. Zubrod, a notary public, duly commissioned, qualified and acting in and for the county and State aforesaid, M. H. Smith, who being duly sworn by me, deposes and says:

That he is the President of the Louisville & Nashville Railroad Company, the complainant in the foregoing bill of complaint, and that he has read the foregoing bill and knows the contents thereof; that the facts therein stated as of complainant's own knowledge are true; and the facts therein stated as upon complainant's information and belief, he believes to be true.

M. H. SMITH.

Subscribed and sworn to before me this 24th day of July, 1906.

In witness whereof I have hereunto signed my name and affixed my official seal at Louisville, in the State of Kentucky.

My commission expires on the 5th day of February, 1908.

[SEAL.] GEORGE E. ZUBROD,
Notary Public, Jefferson County, Ky.

564 Comparison of L. & N. R. R. Values in 1905 and in 1912.

At this point the witness was asked to state whether the value of the property of the Louisville & Nashville Railroad Company had increased or decreased since the year 1905, (that being the year in which the aforesaid bill of complaint was filed) and if it had increased or decreased in what respect and to what extent, and he thereupon testified as follows:

I will give all the information possible both with respect to the book cost or the original cost, and the cost of reproduction and consider the increases and decreases of both. Our books show the total cost of divisions, but do not always show details as to States. Where the division overlaps a State or crosses the state line, the proportion can be ascertained only on the mileage basis; that is, taking the mileage within the State of Kentucky as compared with the total mileage in that division, in assigning that proportion.

The book cost of the road in 1905 was $57,097,232.53, from which should be deducted depreciation of $8,312,049.88, leaving the book cost of the road in Kentucky, less depreciation, $48,785,182.65.

The original cost of equipment was $10,826,668.77, from which should be deducted accrued depreciation of $2,577,829.83, leaving depreciated value of equipment $8,248,838.94. The total road and equipment would, therefore, be $67,923,901.30, less $10,889,879.71, for depreciation of road and equipment, leaving the net value of road and equipment as of June 30, 1905, based on original cost, $57,034,021.59.

There was no depreciation referred to or figured in the bill of complaint mentioned. Depreciation is a question that has really arisen since 1907, so far as accounting for it in the regular method of accounting is concerned. The Interstate Commission in their revised Classification of Operating Expenses, beginning with 1907, took up the question of depreciation. You are required to charge depreciation on equipment, beginning with July 1, 1907, and are permitted to charge it on Ways and Structures. I do not mean to say that the item of depreciation had never been taken into account

of railroads prior to 1907; but no special account was set up for depreciation prior to that time.

565 I have referred to the cost of the road as shown in the bill of complaint in 1905, and also the depreciation, and I will now endeavor to bring those values or costs down to date, and in doing so, will explain the additions and deductions which should be made and the changes which justify the same. The first and most important thing to be considered is the change in mileage, considering in that connection the change in mileage resulting from the taking up of roads and the changes in mileage resulting from the laying down of roads, so that we may know to what extent the physical properties have increased.

The mileage as reported in 1905, represented in the book cost was, 1,234.25—the total mileage (meaning of course in Kentucky). The total mileage, as represented by those costs seven years later, towit, in 1912, was 1,551.45. There was a total increase in mileage of 326.30, and a decrease for tracks taken up of 8.91 miles, leaving a net increase for 1912 over 1905, 317.39 miles.

The book cost of road as of June 30, 1912, was $67,608,610.44, from which deduct depreciation for way and structures, $11,854,135.23, leaving the cost of road as depreciated, $55,754,455.21.

The cost of equipment as of June 30, 1912, was $15,546,293.75, from which should be deducted accrued depreciation, $5,921,672.79 leaving as the depreciated value of equipment $9,624,620.96.

The total cost of road and equipment as of June 30, 1912, is shown as $83,154,904.19, from which should be deducted accrued depreciation $17,775,828.02, leaving the original cost of road and equipment as of June 30, 1912, $65,379,076.17.

And referring again to this matter of depreciation and to the requirements of the Interstate Commerce Commission on that subject in the matter of accounting, as I have previously stated, beginning with July, 1907, the Interstate Commerce Commission required that we accrue depreciation on equipment and charge it in our operating expenses and permitted the charging to operating expenses of depreciation of way and structures. In accordance with the requirements of the Interstate Commerce Commission we made extensive investigations and had re valuations or values placed upon each unit of equipment, and the life of each unit of

566 equipment in service as of July 1st, 1906, and worked out tables to ascertain the proper rate of depreciation that should be charged in each class of equipment separately, locomotives, passenger and freight cars—all classes, separately. In short, we prepared for every unit of equipment and for various classes of equipment, experience tables, just as an insurance actuary would prepare tables to determine life insurance rates. In connection with the way and structure items, we went into the subject of depreciation very extensively, and each item that was subject to depreciation was considered as to the value of that item and the average life of the item and the amount of expired life and the amount subject to depreciation after deducting scrap value that would remain in the unit. In connection with certain litigation in Alabama, we

worked these matters out for every individual division in that State, and on the basis of that result, the Interstate Commerce Commission permitted us to make regular charges to our operating expenses, beginning January, 1909, is my recollection, and we have since been making those charges to operating expenses under the instruction and permission of the Interstate Commerce Commission. We found through that investigation that we had failed to provide in our previous method of accounting for depreciation; and with respect to equipment only, to adjust our book accounts for depreciation we had failed to charge, it was necessary to charge off to profit and loss something over two million and a quarter of dollars for depreciation. We have been unable to determine definitely what amount should be charged to profit and loss for our failure to provide for depreciation of way and structures. In arriving at the depreciation for Kentucky, I have taken each division in Kentucky, and from the estimated cost of reproduction furnished by Mr. Courtenay, Chief Engineer, have obtained tables of the values of the amounts included in his cost of reproduction values for all items subject to depreciation by each division; and based upon the results of our analysis in Alabama, I have applied the percentages to each item subject to depreciation in ways and structures for each division separately in Kentucky and ascertained the amount of accrued depreciation which I have stated in that manner.

567 The figures which I have lately been giving are our original cost figures for 1905 and 1912, with charges for depreciation.

I will now make a comparison of reproduction values for 1905, with reproduction values for 1912, and in doing so will use an estimate of the cost of reproduction made in 1907 by Mr. Courtenay, Chief Engineer of the Louisville & Nashville Railroad Company, and will consider in connection therewith the additions and betterments which have been made since that time, according to the best information the Chief Engineer has been able to give me.

The estimated cost of reproduction of lines in Kentucky, as shown by Mr. Courtenay's estimate in 1905 was $59,704,059.14. Deducting from this amount accrued depreciation to June 30, 1905, $8,312,049.88, would leave the estimated cost of reproducing lines in Kentucky, less depreciation as of June 30, 1905, $51,392,009.26, and thus we would have the total cost of reproduction of road and equipment, less depreciation, as of June 30, 1905, $59,630,848.20.

The figures on the cost of reproduction as of June 30, 1912, were arrived at by taking an estimate of the cost of reproduction made by the Chief Engineer as of June 30, 1907, $64,577,539.72, and adding thereto the additions and betterments since 1907, to-wit, $5,859,170.89, showing total cost of road as of June 30, 1912, of $70,437,740.61 From this amount should be deducted the accrued depreciation to June 30, 1912,—$11,854,155.23, leaving the depreciated value of road of $58,582,585.38. I have previously stated the cost of equipment and the amount of depreciation. The net or depreciated value of equipment as of June 30, 1912, was $9,624,620.96, making the total depreciated cost of road and equipment

as of June 30, 1912, $68,207,206.34. As heretofore explained the values given include the value of the entire Newport & Cincinnati Bridge, although a part of that bridge is in Ohio.

And some of the expenditures included in the cost of reproduction are of value only because business from other states passes over them. Thus there are large expenditures, particularly in
568 Kentucky, which are made for tunnels, which would have no other value than merely to get through to another State, or to do the business of the entire road, and which would not be worth the amount expended upon them if it were not for the interstate business. And much of the value of these tunnels and a large amount of work done in reducing grades and curves arise from the fact that there is a large system operating as an entirety, which is able to throw a sufficient volume of traffic over the road to produce economies in transportation. The facilities when once created, however, are of value for intrastate as well as interstate traffic.

Information Furnished in Response to Request from the Board of Valuation and Assessment.

The average market price of the stocks of the Louisville & Nashville Railroad Company for the year ending June 30, 1812, to which I have testified, reflected, of course, the effects of whatever increased or decreased earnings of the road there were. The average selling price or market price of the L. & N. stock in paragraph B of the Board's response to the Louisville & Nashville Railroad Company is given at $152.50. The correct average was $152.0825.

I do not know what was the highest price for which stock was sold during that year. I only know the highest price of stock sold on the New York Stock Exchange, and that was stock sold April 9, 1912, which was a sale of a thousand shares at $163, flat. The lowest sold on the New York Exchange was on February 1st, 1912, $149 7/8.

The amount of outstanding bonds in the hands of the public, face value, during that year was $136,078,500. There is a clerical error of $900,000. in this item in the response of the Board to the Railroad Company.

The Board in its response shows that $7,079,000. of authorized issue of the Company in its treasury is deposited as collateral and should be charged to the capital stock of the respondent in ascertaining the value thereof. But the bonds resting on that col-
569 lateral are included in the amount of bonds heretofore given, to-wit, $136,078,500.

The amount shown in paragraph D of the Board's response as the value of the Company's stock and bonds, to-wit, $227,278,500, is not the combined market value of the stocks and bonds, nor the combined par value of stocks and bonds. It is a mixture of the two, such as would give the highest possible amount.

The Board in paragraphs J and K of *its* response show that they considered the operated mileage in Kentucky as compared with the operated mileage within and without Kentucky and that they

used a percentage of 35% as in Kentucky. But the fact is that the percentage of operated mileage in Kentucky, excluding mileage of those roads that are separately taxed, is only 32.647. As shown on Exhibit Geo. W. Lamb No. 28, which is filed herewith, the total mileage of this character referred to is 4311.86, and the mileage in Kentucky of the same kind is 1407.72; the part in Kentucky, therefore, being 32.647% of the whole.

In their response, the Board speaks of income percentages, gross or net, in Kentucky, as compared with the rest of the line. But any atempt to show income or earning percentages, gross or net in Kentucky, as compared with the rest of the line is unreliable. I have already given a number of illustrations of this, particularly with reference to the distribution of revenues. All of the revenues are distributed to the State of Kentucky on arbitrary bases, and it is impossible to accurately apportion these revenues. In some cases block mileage percentages are used for inter-divisional accounting, and as an illustration of the difficulties of getting the interstate revenues into the State, I will use the distribution on the Cumberland Valley Division running from Corbin, Kentucky, to Norton, Virginia, through the Cumberland Gap. Under the block mileage percentages regularly used in the distribution of revenues arising from freight traffic originating or terminating on the Cumberland Division, the Cumberland Valley Division, regardless of the length of haul over that division, receives 40 per cent. of the total revenue, when the entire haul over Louisville & Nashville lines is 175 570 miles, and not over 275 miles; and regardless of the length of haul over the Cumberland Valley Division, that Division, receives only 30 per cent. of the revenue, when the entire haul over the Louisville & Nashville Lines is 275 miles and not over 350 miles. The great bulk of coal and coke shipments from that part of the Cumberland Valley Division which lies in the State of Virginia and handled either to or through Cincinnati, Ohio, and Louisville, Kentucky, originate beyond a point 275 miles from Louisville or Cincinnati. The result is that comparatively thin allowance of 30 per cent. for the long haul beyond the 275 mile point is apportioned to the line in Virginia on a mileage basis, while the part of the division in the State of Kentucky receives on all of such traffic originating or terminating thereon at least 40 per cent.

In the case which I referred to a while ago as the I. & S. 71 before the Interstate Commerce Commission, affecting the rates on coal and coke from Virginia mines and ovens on the Cumberland Valley Division, complaining Virginia miners and operators have claimed that the line in Virginia is not allowed a sufficient amount of revenue on this traffic, and the Louisville & Nashville Railroad Company has met this contention by considering not merely the revenues and expenses of the line in Virginia, but the revenues and expenses of all lines over which the traffic in controversy moves; and in the same or similar way, if the Interstate operating revenues, either gross or net, are to be considered in the assessment of franchises, the entire system with respect to such

interstate traffic must be treated as an indivisible whole, and the franchise values, at least in so far as they arise from interstate traffic, should be distributed equally, mile for mile, throughout the System in Kentucky, and in other States.

Block mileage, or constructive mileage, is also used on the Kentucky Division, where, on account of the originating of the traffic mileage in excess of the straight mileage haul is allowed to certain divisions.

So on the main line of the road, the Main Stem, as it is called (line from Louisville to Nashville) is allowed a great deal of traffic which moves south and beyond the Kentucky line, more
571 than its mileage prorate on business going south.

In the matter of freight expenses, about one-third, at least, of the expense is independent of the length of the haul.

The terminal expenses of traffic coming from beyond the Ohio River or by way of the Cincinnati gateway, particularly the station expenses, are largely incurred on the other side of the river in the State of Ohio. These expenses, however, are charged to Kentucky, just as the revenues for business done in Ohio are credited to Kentucky—the entire operation is credited to Kentucky.

Expenses of interstate divisions of the road, that is of divisions of the road which cross state lines, are divided on an arbitrary train mile basis, and, therefore, you cannot say just what expenses are charged to any state, for example, if you allow the Main Stem a constructive mileage, a prorate on the constructive mileage, you give Kentucky its proportion of the Main Stem earnings on a straight mileage basis between Kentucky and Tennessee and when you come to prorate the expenses for the Main Stem you distribute them on a train mile basis without reference to where they are incurred. By the Main Stem, I mean the line of railroad from Louisville to Nashville.

The main office building of the Louisville & Nashville Railroad in Louisville, Kentucky, represents an investment of over $750,000., nearly a million dollars, but we do not apportion any earnings to the General Office Building as a division of the road. That office building is distributed upon an arbitrary basis over the entire system.

Likewise, there is no way, except upon an arbitrary basis of apportionment, of telling how much of the salary of Mr. Milton H. Smith or of any officer of the road should be charged to Kentucky, and how much to other states. Again, we have shops at Decatur, Ala., which make most of the car wheels or place most of the car wheels on the freight equipment of the entire system, and the materials used in those shops and the services of the employees in those shops, and the shops themselves, are devoted to the use
572 of the entire system, that is to say, are all used in earning some of those interstate earnings, of which a part is credited to the State of Kentucky.

Mail earnings are divided absolutely upon an arbitrary basis. It is impossible to ascertain what mail is handled intrastate and what is handled interstate. It is divided arbitrarily on a track mileage basis. As between interstate and intrastate, we divide according to

the nature of the road. If it is an interstate road, it is assigned to interstate and intrastate to intrastate.

Express earnings are divided between interstate and intrastate on the basis of the distribution of passenger revenues interstate and intrastate; that we have no assurance that some proportion of the express business is intrastate business *as is* true in the case of passenger business. It is just an arbitrary division.

These divisions are made, not for the purpose of stating accurately the results of the earnings in Kentucky, but merely for comparative purposes from year to year. And the reports to the Railroad Commission are not made for the purpose of arriving at valuations or determining the real earnings, but for administrative purposes only. And in the report of the road to the Railroad Commission for the year 1912, it drew attention to the fact that the income accounts stated included items which should not be charged against the Louisville & Nashville Railroad Company, and light is thrown on that subject by the following correspondence, to-wit:

Under date of October 22, 1912, Mr. W. J. J. Preuss, Rate Clerk of the Kentucky Railroad Commission, addressed Mr. A. J. Pharr, Assistant Comptroller, L. & N. Railroad Company, a letter as follows:

"Each year you have furnished this office in addition to the general operating report, for assessment purposes, a statement showing the gross and net earnings by divisions, and gross and net per mile of each division. Please let us have at once such report, as we are now ready for same. It has been customary to furnish your legal department with a copy of this report."

573 Under date of November 6, 1912, over the signature of Mr. Charles Haydon, Comptroller, the following response was made to the inquiry of Mr. Preuss:

"Responding to your letter of the 22nd ult., I note that you request, for assessment purposes, a statement showing gross and net earnings by divisions, in addition to the general operating report. The statement of gross and net earnings compiled by this Company by operating divisions are of no value for assessment purposes within the State of Kentucky for the reason that the divisions having the heaviest operating revenues, both gross and net, are interstate divisions, lying partly within and partly without the State of Kentucky, and even if the gross and net operating revenue and expenses by operating divisions are correctly stated, it is possible to arrive — or approximate the net results for the different States on interstate divisions only by an arbitrary apportionment of the results, particularly operating expense results shown for interstate divisions.

"Gross operating revenues, intrastate, as — whole for any State, can be stated with substantial certainty, and if you desire a statement of intrastate operating revenue in Kentucky, I shall be glad to furnish you with such a statement promptly upon your advice to that effect. But the distributions made between operating divisions of even intrastate earnings are in many cases upon an arbitrary mileage basis, regardless of the way in which the rates are made. If, with this understanding, you desire a statement of

the distribution of our intra-state gross operating revenues in Kentucky by operating divisions, as made by this company, I shall be glad to furnish such statement upon receipt of your further advice. It is impossible, except upon some arbitrary plan, to ascertain the operating expenses attributable to the operating revenues, and consequently net operating revenues, for intrastate traffic. And the value of such a statement for assessment purposes, if it has any value, in such a connection, depends upon the reasonableness of the arbitrary methods of apportionment adopted.

574 "The difficulties indicated with respect to the ascertainment of intrastate net operating revenues of the State of Kentucky are, of course, greatly magnified if we attempt to estimate the proportion of interstate net operating revenue apportionable to the State of Kentucky. And the attempted apportionment of interstate operating revenues, either gross or net, to the State of Kentucky, could be of no value for assessment purposes, nor could any results, including such interstate results be of any value for assessment purposes.

"Operating revenues and operating expenses, both interstate and intrastate, by divisions, being worked out by the company upon substantially the same plans year after year, the amount of gross and net operating revenues, total, interstate and intrastate, shown for the several divisions are of value for comparative purposes and to this extent may be of value in considering comparative assessments. And if you desire a statement of gross and net operating revenues by operating divisions lying partly or wholly within the State of Kentucky for such comparative purposes, we shall be glad to furnish such a statement for those purposes. Whatever statements of this nature may have been presented to you in the past by any department of this company were presented for comparative purposes only, and not for assessment purposes, or for the purpose of making assessments based upon consideration of the statement for any year in and of itself; and the Louisville & Nashville Railroad Company protests against the use of such statements in any attempt to base assessments, (other than by way of comparison) upon statements of gross or net operating revenues, or earnings by divisions."

The inside cover of the report to which I have referred, being the report of the Louisville & Nashville Railroad Company to the Railroad Commission of Kentucky for the fiscal year ending June 30, 1912, shows that it is a report made in accordance with section 825 of the Kentucky statutes, which is a section that does not relate to the subject of taxation.

575 The Auditor of Public Accounts of Kentucky has never called upon the road for a statement of either net or gross revenues in Kentucky as compared with net or gross revenues in other States, in accordance with Sections 3078 or 4079 of the Kentucky Statutes or in accordance with any other statutes relating to the assessments of corporations or under any other revenue or taxation laws.

The printed blank sent out by the Auditor to the Railroad Com-

pany calling for information does contain a blank for the statement of gross income and also a blank for net income; but it being impossible to answer that question as to the earnings in and out of the State on business done in the State, where it is an interstate railroad, the Louisville & Nashville Railroad Company has never furnished nor attempted to furnish that information to the Auditor in these reports called for by him. And when these reports have been sent into the Auditor with these blanks as to gross income and net income left unfilled, the Auditor has never made any demand or requirement that the question be answered. In making the reports to the Auditor on the printed blanks sent out by him, the gross and net income on the entire system of the road were shown, but not for the State of Kentucky.

I file as an exhibit the papers marked Exhibit Geo. W. Lamb No. 29, showing the total mileage of roads operated, owned, leased or controlled as of June 30, 1912, divided as between mileage in the State of Kentucky and mileage outside of the State of Kentucky; the percentage of the mileage in Kentucky being 24.6901%.

In paragraph P of the Board's response to the Louisville & Nashville Railroad Company, the first calculation therein under the heading "Valuation No. 1" starts out with the net income for consideration of $17,159,550.00. But that income so stated, includes not only the income from the operated mileage of the Louisville & Nashville Railroad Company, which is available to the Louisville & Nashville Railroad Company itself, but also includes other items as I have heretofore explained.

Under the same heading "Valuation No. 1," the total value of the capital stock of the Company, used as a starting point, is
576 $285,992,500. But it is not possible under any method of calculation or estimate which has been suggested by the Board or considered by me, to arrive at such a valuation without a duplication of assets. In this same paper under the heading "Valuation No. 2," the Board makes a calculation, which begins by deducting from what they suppose to be the net income of the L. & N. Railroad Company of something over $17,000,000, less rents and dividends of $1,307,067, presumably, leaving what they take to be the net operating income of the Louisville & Nashville System applicable to that operated mileage. But that is not correct, and I have heretofore presented figures which show its incorrectness. Under the heading "Valuation No. 5"—Valuation in conformity with Judge Cochran's opinion—the Board in said response gives a calculation which starts with an item "operating revenue of the L. & N. Railroad Company, as shown by Interstate Commerce Commission $14,882,672." That item includes the results of operation of roads which are separately taxed in the State of Kentucky.

The next item in the Board's response is a statement of tangible value of operated mileage. The amount of that is $178,927,902, but that value includes property separately taxed, which I have shown in detail. Under that calculation the Board has this to say: "In addition to the operated mileage and equipment thereof the L. & N. Railroad Company owns and has the following personal property,

all of which is taxable and must be considered by the Board in fixing the value of its franchise subject to taxation." Then after referring to the case of Commonwealth v. Cumberland Telephone & Telegraph Company, 24 Ky., 535; 30 Kentucky Law Reporter, 723, as showing in the Board's opinion that this personal property is taxable, it then describes certain of this personal property as "bonds, par value $13,065,408.—Ledger value $12,538,049." But the value of these bonds is included in the values derived from the operating revenues, and are not in addition to those revenues, and are also included in the value of the Company's property measured by its stocks and bonds heretofore given.

577 The Board next considers advances to proprietary, affiliated and controlled companies for construction and betterments, $7,992,897. That amount, however, is not in addition to the operated mileage, but is included in it. And the same is true concerning the temporary advances to proprietary, affiliated and controlled companies, to-wit, $6,335,245.

Likewise the special deposits of $862,135, mentioned in this connection by the Board in its response, are included in the total values of the stocks and bonds of the Company.

Here the direct examination of Mr. Lamb closed.

On November 25th, 1913, at the hearing before the Board of Valuation and Assessment, the Board presented an additional response on behalf of the Board to the Louisville & Nashville Railroad Company, which is as follows:

"Mr. Bosworth: We have an additional response which we desire to present.

The said additional response is as follows:

'November 25, 1913.

To Colonel Henry L. Stone, Colonel W. A. Colston, Mr. Robert E. Fleming, Attorneys for the Louisville & Nashville Railroad Company.

GENTLEMEN: In the protest filed by you before the Board of Valuation and Assessment, paragraphr 14 thereof contains the statement that 'the said Board' (Board of Valuation and Assessment) 'has for the years 1912 and 1913, intentionally, habitually and purposely valued and assessed the intangible property or franchise of other public service corporations in this state at not exceeding 60 per cent of the real or fair cash value,' (ascertained at the price the same would bring at a fair voluntary sale).

This Board, and each member thereof separately, denies the foregoing statement, and we, the members of said Board of Valuation and Assessment who are so charged in your protest, respect-

578 fully request that you furnish to us the names of the corporations so assessed, the assessed value of their franchise for the years referred to, and the real value of the franchises of said corporations.

In the same section of your protest, you say: 'And said county as-

sessors, Boards of County Supervisors and State Board of Equalization have intentionally, habitually and systematically valued and assessed farm lands, city and town lots and improvements thereon as well as other property assessable by said officials and boards for taxation in 1913, and many years prior thereto, at not exceeding 60 per cent of the real or fair cash value thereof' (estimated at the price the same would bring at a fair voluntary sale) 'all of which was well known to said Board and was and is in violation of the equal protection clause of section 1 of the Fourteenth Amendment to the Constitution of the United States."

This Board denies that it had any knowledge of any assessor or any county Board of Supervisors or any State Board of Equalization intentionally, habitually or systematically valuing or assessing any property contrary to the laws of this Commonwealth or the laws of the United States. Therefore, they respectfully request that you furnish to them the name of the assessors, the counties in which they reside, the names of the members of the Board of Supervisors together with their postoffice address, and the names of the members of said State Board of Equalization together with their postoffice address and the description of the property so assessed.

H. M. BOSWORTH.
THOS. S. RHEA.
C. F. CRECELIUS.' "

Cross-examination of Geo. W. Lamb by Attorney General Garnett:

The witness was asked by the Attorney General the following question and gave the following answer:

"I see in the report made by the Louisville & Nashville Railroad Company to the Auditor of Public Accounts of Kentucky as
579 of June 30, 1912, that the statement is made that the total mileage operated, owned, leased or controlled in this State is 1,992.45 miles; also the total length of the entire line or lines as above, operated, owned, leased or controlled elsewhere than in this State is 5,955.38 miles, which, added to the mileage in Kentucky, makes a total mileage operated, owned, leased or controlled of 7,947.83 miles. On pages 4, 5, and 6 of the returns to the Auditor of Public Accounts of Taxable property in the State of Kentucky by the Louisville & Nashville Railroad Company for the year 1912, which is a blue print, the following statement is contained: 'Statement of length of all railroads on which rolling stock belonging to the Louisville & Nashville Railroad Company is operated,' and after naming the roads, the total is given as 4,567.825 miles; and on page 5 of the Sixty-first Annual Report of the Louisville & Nashville Railroad Company for the year ending June 30, 1912, which is commonly called Report of Stockholders, contains a statement of lines owned and operated, amounting to 4,740.49; and on page 3 of Exhibit 28, filed on direct examination, is a recapitulation owned and operated, operated under entire capital stock, operated under lease, operated under trackage arrangements, owner of entire capital stock,

property operated separately, operated by this Company under trackage arrangements, and operated on account of owner, total mileage, 4,700.49, and in Kentucky, 1,595.39 miles: Will you now please explain to me why the difference in the totals of these four statements?

A. In response to the last figures quoted by you, first you gave the total mileage as shown on page 5 of the printed report to the stockholders of the Louisville & Nashville Railroad for the fiscal year 1912, as 4,740.49 miles. By reference to the third page of Exhibit Geo. W. Lamb No. 28, the total of the mileage which you were just quoting is shown as 4,700.49 miles, a difference of 40 miles. This, I have previously explained is accounted for by elimination of the mileage of the Frankfort & Cincinnati Railway, 40 miles.

580 The total amount which you have quoted as being reported by the Real Estate Agent as 4,567,825 miles, compared with the 7,947.83 miles, as shown in the report of the Comptroller, to the Auditor of Public Accounts, shows a difference of 3,380.005 miles. I will file as Cross-Exhibit George W. Lamb No. 1, a statement accounting for this difference. In a general way, the explanation of this is that the statement of the Real Estate Agent represents mileage as stated by him over which the wheelage of the L. & N. Railroad Company operates, or, in other words, certain operated mileage, while the 7,947.83 miles represents the total of lines operated, owned, leased or controlled, including the Georgia Railroad and dependencies, Chicago, Indianapolis & Louisville Railway, L. H. & St. L. Paducah & Memphis Division, Clarksville & Princeton Branch, N. C. & St. L. Railway, and New Orleans, Mobile and Chicago Railroad, among others. As additional explanation, which I believe has previously been made, there will be found slight differences between the operated mileage reported by the comptroller, and the operated mileage reported by the Real Estate Agent for the reason that the Comptroller reports the total length of track that is actually operated, while the Real Estate Agent reports the tracks subject to taxation. As an illustration, taking the Lexington Branch, you will note that the Real Estate Agent is under the Comptroller .97 miles. This is due to the fact that that track, where it branches off at La Grange, practically parallels itself for nearly a mile, and for the purpose of taxation, they only tax the one right of way. It is all on the one right of way that comes along there, and in nearly all cases the Real Estate Agent reports for taxation the mileage to the center of the passenger station, where a track may extend a little bit beyond for the movement of a train, while the Chief Engineer would report, which is used by the Comptroller, to the end of the track, over which trains are operated. These differences are immaterial."

And then further explaining the witness said: The report of the comptroller to the Auditor of Public Accounts shows the total
581 mileage as 7,947.83, and in the State of Kentucky 1,992.45, which gives the percentage for Kentucky of 25.06%. This mileage includes the mileage of the Frankfort & Cincinnati Railway, which I have previously explained.

The mileage reported by the Real Estate Agent (Bradford) to-

wit: 4,567.825, as the total, and 1,495.25 as in Kentucky, gives a percentage to Kentucky of 32.71%. This mileage includes the mileage of the Elkton & Guthrie Railroad and the Glasgow Railway.

The mileage as shown by Exhibit Geo. W. Lamb No. 28 is 4,700.49, for the total, and 1,595.89 for Kentucky, which gives Kentucky a percentage of 33.8%. This mileage includes the mileage of the South & North Alabama, the Elkton & Guthrie, and Glasgow Railway, operated for account of owners, and also the mileage of roads separately taxed in the State of Kentucky, which figures I have previously stated in the record; the total after making corrections being 4,311.86, and in Kentucky 1,407.72; Kentucky's percentage being 32.6476%. I have also previously made reference to the mileage of the Kentucky Highlands Railroad, Millville to Versailles, which was deducted, and which I later added back; and revising the figures the percentage is not appreciably changed.

In arriving at the 32% apportionment, I excluded the Morganfield & Atlanta, the Madisonville, Hartford & Eastern, the Wasioto & Black Mountain, the Kentucky Highlands, Millville to Versailles, and the Kentucky Highlands, Millville to Cliffside; and if you add back the Millville to Versailles, the percentage will be substantially the same.

If you assume that these roads, just mentioned, are not separately taxed, but are a part of the system of the L. & N. Railroad for the purpose of taxation and are included in the operated mileage, but excluding the mileage operated for account of owners, Kentucky's percentage would be 35.1553.

If you take the mileage both in and out of Kentucky, from which the Louisville & Nashville Railroad Company receives all of the operating revenues, (meaning income from every source) and pays all of the operating expenses, then the figures are as shown on
582 Exhibit Geo. W. Lamb No. 28; being for the total mileage 4,321.28, and for Kentucky, 417.14; Kentucky's percentage being 32.7944%. The Morganfield & Atlanta Railroad, the Madisonville, Hartford & Eastern Railroad, and the Wasioto & Black Mountain Railroad are operated by the Louisville & Nashville Railroad Company as owners of the capital stock, and earnings are reported and kept so that you can separately report them—separately kept as an operating division, and are embraced within the total earnings of the L. & N. system.

The L. & N. does not keep an account relative to the Maysville & Lexington Division, so that it shows the operating income and operating expenses of that division. The Maysville & Lexington Division is operated as a part of the Kentucky Division, and the earnings are all included within the total for Kentucky Division.

I find by reference to the returns to the Auditor of Public Accounts of the State of Kentucky of the tangible property in the State of Kentucky by the Louisville & Nashville Railroad Company for the year 1912, prepared by the Real Estate Agent, that the Morganfield & Atlanta Railroad is included in the statement of all the length of all roads operated by the Louisville & Nashville Railroad Company in the State of Kentucky.

I made the statement that the Madisonville, Hartford & Eastern and the Morganfield & Atlanta were separately taxed from the answer to a specific inquiry that I addressed to the Real Estate Agent for the purpose verifying that fact. This is my only source of information. I never examined the records of the Auditor's office.

I did not know that the Real Estate Agent, after he had reported, and after the assessment had been made, addressed a communication to the Auditor's office asking that it be withdrawn. I was not informed of that fact.

The Madisonville, Hartford & Eastern, the Morganfield & Atlanta, the Maysville & Lexington and the Owensboro & Nashville are all operated by the L. & N. R. R. Co., as the owner of the entire capital stock of those roads. The receipts and operating rev-
583 enues from all of those roads are received by the L. & N. in the same way that it receives operating receipts from the roads that it owns in fee; and the operating expenses of all of those roads are paid by the L. & N. in the same way that it pays the operating expenses of the roads it owns in fee; and the accounts are so kept that if it were necessary to afford an accounting that could be given; and no accounting could be demanded for the earnings of these roads by any one, except the L. & N. R. Co. I know of no reason for keeping a separate account, except for the information of the stockholders who may desire to know the amount invested in a certain division of the road.

A separate accounting is likewise kept of the Shelbyville & Bloomfield Branch, and likewise of the Greensburg Branch. The purpose of keeping separate accounts of these separate branches is to permit of comparison of results for one year with another. These accounts are kept in this way for comparative purposes, so as compare one period with another period for the information of the Executive Department. The accounts are not accurate for the purpose of assessing a franchise value for many reasons, some of which I gave on my direct examination. They are parts of an integral whole, and it is impossible, except on some arbitrary basis, to apportion them between divisions, and a very large proportion of the revenue arises from the interstate traffic, which goes over and affects the entire system of the L. & N. Railroad Company, and should be considered as a whole.

As to the accuracy of these accounts for the purpose of comparison, it is true that anything that is made up on the same basis for a number or series of years affords a comparison on that basis. I mean a comparison of one period with another. In the case of the Elkton & Guthrie Railroad and the Glasgow Railway, the L. & N. pays over the net earnings to the Elkton & Guthrie and to the Glasgow Railway. In the case of those roads an account is kept showing their earnings and expenses, and according to those accounts, the parties settle satisfactorily to themselves.

The operations of the Southeast & St. Louis Railway, Morganfield & Atlanta Railroad, Madisonville, Hartford & Eastern Rail-
584 road, Owensboro & Nashville Railway, Bay Minette Fort Morgan Railroad, Pontchartrain Railroad, and Wasioto & Black Mountain Railroad are separately kept as operating divisions; the

Maysville & Lexington, Northern Division and Southern Divisions, are included in the operations of the Kentucky Division. The Stouts Mountain Railroad is in the operations of the South and North Alabama.

The Pine Mountain Railroad West, is included in the operations of the Knoxville Division. The Pine Mountain Railroad, East, is included in the Cumberland Valley Division. The Swann Creek Railway is included in the Nashville, Florence & Sheffield Division; the Harriman, Knoxville & Eastern Railroad is a part of the Knoxville Divison. And from the accounts of these operations, the L. & N. Railroad could settle with those railroads in the event a settlement were required between the corporations.

Witness was read a clause from the Trust Indenture, securing the Louisville & Nashville Railroad—Southern—Monon collateral 4% joint bonds for the purpose of showing the interest of each of the Companies in the Monon, to-wit, the Chicago, Indianapolis & Louisville Railway, as follows:

"Whereas, the Louisville Company and the Southern Company each desires to acquire an interest in the capital stock of the Monon Company, but it was found impractable to acquire a substantial amount of such stock except by the purchase thereof jointly, and by the issue in payment therefor of the joint bonds of the Louisville Company and of the Southern Company, as hereinafter provided; and, therefore, said companies agreed with each other:

That they would purchase all, or any part, but not less than 51% of the entire capital stock of the Monon Company, on terms agreed upon between them; and that in payment of such stock, they would issue their joint bonds, at par, in payment for such preferred stock at $90 per share, and for such common stock at $78 per share, such issue of bonds not to exceed in all Fifteen Million Five Hundred Dollars, to be issued and disposed of as hereinafter provided; and

have further agreed that all the stock so purchased should be
585 assigned and transferred to the Trustee under an indenture of the tenor of these presents, as security for the payment of the principal and interest of such joint bonds."

The L. & N. Railroad has in Kentucky a mileage of 1,568.01 miles, on which the operating revenues are taken in as earnings of the L. & N. System, and are subject to any accounting that may be called for by the roads which are separately shown as being separately taxed in the State of Kentucky. The percentage to Kentucky of the roads here referred to would be 35 plus, not excluding the mileage separately taxed, and by excluding the mileage separately taxed it would be 32 plus.

335. Then if you exclude the Morganfield & Atlanta, the Madisonville, Hartford & Eastern, the Wasioto & Black Mountain and the Kentucky Highlands, the percentage in Kentucky is 32 plus, is it not?

A. Yes, sir.

336. And if you include these roads, the percentage in Kentucky is 35 plus?

A. Yes, sir.

The Louisville & Nashville Railroad for the years 1908, 1909, 1910, 1911 and 1912, expended in additions and betterments in Kentucky the sum of $5,859,170.89. These amounts do not include roads acquired which had already been constructed.

The net surplus of the Louisville & Nashville Railroad Company for the year ending June 30, 1912, was $9,550,771.88. Out of that a dividend of $4,200,000 was paid, and also certain other items shown in the annual report to stockholders under the heading "debits in profit and loss account," so that the net amount carried to profit and loss for the fiscal year ending June 30, 1912, was $5,250,808.25. In addition to which there was also carried to profit and loss $655,144.88, which did not come through the income account.

On June 30, 1911, there was a balance to the credit of profit and loss of $31,513,953.26, and on June 30, 1912, there was a balance to the credit of that account of $37,419,876.39.

The total operating revenues of the Louisville & Nashville Railroad Company for the year ending June 30, 1912, were $56,211,788.30, of which amount $5,314,590.41, accrued from roads which were operated for account of their owners, leaving gross revenues of the Louisville & Nashville Railroad of $50,897,187.89.

The net operating revenues of the three roads operated for account of owners for the year ending June 30, 1912, were as follows:

	South and North Alabama	$1,670,013.84
586	Elkton & Guthrie Railroad	6,049.84
	Glasgow Railway	21,847.95
	Total	$1,707,911.63

The net operating income of the Louisville & Nashville Railroad Company after deducting the net revenues of the roads separately taxed would be $13,182,929.05, after deducting taxes, and this only includes the deduction of the revenues which have accrued to those particular roads, and does not include the deduction of any revenues which the Louisville & Nashville Railroad derived from the operation of those roads and which it would lose by the elimination of those roads from its operating system.

Cross-examination of Mr. Geo. W. Lamb by Mr. Rich:

The total market value of the capital stock and bonded indebtedness of the Louisville & Nashville Railroad Company is as accurate a measure of the total value of all of its property, tangible and intangible, as I am aware of. I think the capitalization of the bonds and stock is the most accurate method, and *noo*their method that I know of would be accurate.

I think it has been held by the Association of Railway Commissioners that the reproduction value of railroads is the proper value to be used in connection with rate litigation and is not proper in connection with taxation purposes. I do not think the cost of reproduction is of evidential value for taxation purposes.

I do not think the capitalization of net income is an accurate means of obtaining the value of railroad property, because of the uncertainties attaching to this process, such as the uncertainty of the distribution of revenues and expenses; a subject which has been gone into quite elaborately in this examination.

I consider the stock and bond plan more accurate in determining the value of the capital stock of a railroad company, because the market value of the stock and bonds represents the opinion which is placed upon the property by the public.

The market value of stocks and bonds fluctuate, but it is
587 the best measure as to the real value which it is possible to ascertain. Of course you must take the values of these stocks and bonds over a sufficient period to ascertain an average result. Of course, the net earnings of the railroad would have an influence on the market value of its stocks and bonds, the net earnings have more influence in this respect than the gross earnings.

The majority of the shares of stock of the Louisville & Nashville Railroad Company are held in trust by the Atlantic Coast Line Railroad Company, and have thus been held for several years.

The Louisville & Nashville Railroad Company for several years has been declaring a 7% dividend. Prior to that it paid 6%; but I do not know for just how long.

On June 30, 1912, the Company transferred to the credit of profit and loss $9,560,771.88 of its earnings for that year, which sum was available for dividends, and if this sum had been declared out as a dividend, it would have amounted to about 15% on the capital stock.

For the year ending June 30, 1911, the Company had available for dividends to stockholders $8,855,332.71.

As to my qualifications for testifying as to the value of the physical property of the Louisville & Nashville Railroad Company, I am able, as I have done in the investigations which I have made as to the values of properties in the various States, in connection with rate litigation, to ascertain the values of the tangible properties as reflected from our books, and as to reproduction values, through the assistance of our Engineering Department. As to the real values from a financier's standpoint, I am unable to state such values.

In arriving at the value of the tangible properties of the Louisville & Nashville Railroad in the various states, for which I have attempted to obtain such values, we have obtained it in *us*usually in two or three ways. We have shown the book values of various porperties in the State. Have added to those books values, the assets used in connection with the operation of the roads devoted to public use,
588 and assigned our equipment to the State for which the investigation is made; in other words, have considered all properties that were devoted to public use in connection with the particular investigation. To the tangible values that we ascertained, particularly in the State of Alabama, we added the franchise values as assessed against the L. & N. Railroad properties in the State of Alabama and obtained the total tangible and intangible value of the property.

We also, as another measure of value, showed the cost of repro-

duction, new, and obtained values of equipment assigned to the State and added thereto the various assets properly apportionable to that State, and deducted from the total the amount of accrued depreciation on both road and equipment and added to that value the franchise value as previously explained.

We also assigned to the State of Alabama, as another measure, a valuation based on the market value of stocks and bonds assignable to the State of Alabama.

I think those are the three processes. In assigning the value of stocks and bonds to Alabama, we assigned to the State of Alabama its proportion on an operating expense basis, that is, the basis of the expenses in the State of Alabama to the total operating expenses of the L. & N. System.

The gross earnings basis of apportionment was not used.

I have not applied those tests to ascertain the value of the property of the L. & N. Railroad Company situated within the State of Kentucky. The purpose of ascertaining the values in the two states were for two different purposes,—one was a valuation for rate making purposes, and the other a valuation for taxation purposes; and I do not think the values for those two purposes are identical.

As shown by our book cost, the value of the road and equipment of the Louisville & Nashville Railroad Company in Kentucky for the year ending June 30, 1912, was $65,379,076.17. The estimated cost of production as of that date was $68,207,206.34. The figures stated in the protest filed by the Louisville & Nashville Railroad Company against the tentative assessment made against it, as to the value of the tangible property of that railroad in Kentucky
589 and out of Kentucky, to-wit, $178,927,902.15, was arrived at as follows:

The assessed value of the tangible property in Kentucky was $28,806,072.00. Assuming that this was 60% of its real value, it would, therefore, appear that this value raised to full or 100% was $48,010,120. To that as the real value of tangible property in Kentucky, we added the value of tangible properties outside of Kentucky, as shown on exhibit Geo. W. Lamb No. 3, amounting to $130,917,728.15, making the total value of tangible properties both in and out of Kentucky $178,927,902.15. The values given as the tangible property outside of the State of Kentucky are the book values.

The value given above as the assessed value of the tangible properties of the L. & N. in Kentucky does not include the Nashville, Chattanooga & St. Louis Railway or the Chicago, Indianapolis & Louisville Railway or the Lexington & Eastern, they being roads in which the L. & N. owns stock.

In my judgment the fairest method of apportioning to Kentucky a proper proportion of the total value of the capital stock of the L. & N. Railroad is to apportion it according to the proportion which the entire mileage operated, owned, leased or controlled within Kentucky bears to the total mileage operated, owned, leased or controlled within and without Kntucky, because the value of your capitalization is reflected in all of that mileage.

Assuming that the gross revenue of the Louisville & Nashville

Railroad Company for the year ending June 30, 1905, was $38,599,660.26, and knowing that the gross earnings for the whole system for 1912, were $56,211,788.30, there would follow as a result, an increase of $17,612,128.04 or approximately 45%.

And assuming that the gross earnings of the L. & N. Railroad in Kentucky for the year ending June 30, 1905, were $14,643,073, and that the gross earnings of the L. & N. Railroad in Kentucky for the year ending June 30, 1912, were $21,339,626, the percentage of increase of gross earnings in Kentucky for the year ending June 30, 1912, over the gross earnings for the year ending June 30, 1905, would be about 45%.

590 *The Annual Operating Report of the L. & N. Railroad to the Railroad Commission of Kentucky.*

I was in charge of the preparation of the report of the Louisville & Nashville Railroad Company to the Railroad Commission of Kentucky. The figures therein given are correct for the purposes for which the report was rendered—administrative purposes. As explained in my direct examination they include an arbitrary apportoinment of interstate revenues to the State of Kentucky and include something over $6,000,000 of traffic that passes through the State of Kentucky, neither originating nor terminating within that State, and the interstate revenues I have just explained, are arbitrarily apportioned to the State of Kentucky, and as also heretofore explained, the apportionment to Kentucky includes all of the revenues that were earned in the State of Ohio.

By "arbitrary apportionment" I mean that the apportionment was made for administrative purposes over various operating divisions of the State. In distributing the revenues block mileage percentages are applied to the total revenues for the distribution between various divisions of the road, and, in some cases, as I explained on direct examination, constructive mileage percentages were used.

Again revenue derived from carrying the mails was arbitrarily assigned. We do not know the contents of the mail bags, whether interstate or intrastate. We apportion these things by a rule that we use for the purpose of distributing revenues over operating divisions of the System. Different roads have different bases for making apportionments of this kind. But whatever method you use, it is an arbitrary method, and the selection of methods is a matter of choice.

In making the apportionment, the Louisville & Nashville Railroad used probably three different bases of apportionment under differing circumstances. In one case we would use a block mileage percentage and in another case a constructive mileage percentage, and in another case a straight mileage percentage.

591 The mileage of the L. & N. in the State of Ohio is 1 4/10 miles. I am not able to state the value of the property. The total amount of taxes paid in Ohio is $6,710.22.

Any apportionment of interstate earnings must necessarily

be upon an arbitrary basis. There is no rule among railway accountants for apportioning such earnings to a State.

In the proceedings of the Eighteenth Annual Convention of the National Association of Railway Commissioners, the following rule was adopted—"that the apportionment of operating earnings to each state shall be on the following basis, to-wit: each state shall be credited with all the earnings derived from business originating or terminating and being carried entirely within such state, and its mileage proportion of all interstate business, and the operating expenses shall be charged to each state on the basis of train mileage in each state."

That is an arbitrary basis. I cannot say whether it is fair to the railroad companies or not. It occurs to me, however, that on a straight mileage prorate of interstate earnings, no provision would be made for expensive terminals or for originating expense in connection with traffic.

The apportionment which the L. & N. makes was adopted by the Executive department of that company, and is satisfactory to it for administrative purposes.

By the term "administrative purposes" I mean for the purpose of comparing one operating division with another, in any year and giving an opportunity to check up to a certain extent the various Superintendents, and using the same method year after year, it affords a fair comparison one year with another.

The form of operating report of the Railroad Commission of Kentucky calls for the revenues, gross and net, in the State of Kentucky; and the figures reported by the L. & N. to the State of Kentucky were the figures that were worked up on the methods used by it in distributing the revenues among the various states; and the Board has definite information that the figures are not absolutely correct.

592 The L. & N. Railroad does keep a record of the earnings derived by it in the various states through which it passes on the basis which I have explained to you. Referring to the bill of complaint in L. & N. Railroad Company v. Siler, &c., in the United States District Court for the Eastern District of Kentucky, heretofore mentioned, it appears that the mileage basis and the gross earnings basis were used in assigning values to Kentucky. The percentage of expenses to operating revenues on the Louisville & Nashville Railroad Company for the fiscal year ending June 30, 1912, for the entire system was 70.49%. The operating ratio in Kentucky, as shown on page 65 of the report of the Louisville & Nashville Railroad Company to the Kentucky Railroad Commission was 67.05%. On the assumption that that was correct, that portion of the road in Kentucky is operated at a less expense than the System as a whole.

At the request of the Attorney General I read sections 1 and 2 of Article 3 of the trust indenture securing the Louisville & Nashville—Southern—Monon Collateral 4% joint bonds,—July 1, 1902, to-wit:

"Article Three.

Section 1. The trustee shall cause to be transferred into its name as Trustee under this indenture, all shares of the capital stock of the Monon Company, the certificates for which shall be delivered to the Trustee hereunder.

Section 2. Until and unless there shall be some default in the payment, upon demand, of the interest or of some part of the interest on any bond hereby secured, and such default shall have been continued for a period of three months, or in the payment of the principal, or some part of the principal or any bonds hereby secured (1) the Trustee, from time to time upon the written demand of the railway companies authorized by resolution of the Board of Directors of each of the railway companies, shall execute and deliver its powers-of-attorney appointing such person or persons as the railway companies from time to time jointly shall designate in writing as attorney and proxy to vote at meetings of the stockholders of the Monon Company upon all said shares of stock, for the election of
593 directors and for all purposes not in violation of the provisions of section 3 of Article Two hereof; and (2) in case the railway companies shall fail jointly so to designate in writing such person or persons, the Trustee by one of its officers or by an attorney or proxy by it selected, shall vote upon all such stock at elections of directors of the Monon Company, for the election of five persons to be nominated in writing by the Louisville Company, for the election of five persons to be nominated in writing by the Southern Company, and for the election of an eleventh person so to be nominated in writing by both of said railway companies; but if the railway companies shall not, at least five days prior to the date of such election, jointly so nominate a person to be such eleventh director, then the trustees shall vote upon all such stock for the election of such person as eleventh director as shall be nominated in writing by J. P. Morgan & Company, who shall act as Umpire for that purpose. Upon all questions other than the election of directors, if the railway companies shall have failed to designate an attorney or proxy, the Trustee shall vote upon such stock in accordance with any written directions that may be so given to it by both of said railway companies, or, in the absence of written direction so given by both of said railway companies, then in accordance with any written directions that may be so given by either one of the railway companies and by J. P. Morgan & Company, who shall act as Umpire for that purpose. By written agreement of which a copy (authenticated by resolution of the Board of Directors of each of the railway companies) shall be delivered to the Trustee, the Railway Companies may appoint any other person or person- to act as umpire in place of J. P. Morgan & Company under the foregoing provisions; and also may make any provision in lieu of the foregoing provisions in respect of the voting upon any of the stock pledged hereunder, until and unless there shall be some default in the payment upon demand of the interest, or of some part of the interest, on any bond

hereby secured, and such default shall have continued for a
594 period of three months, or in the payment of the principal, or of some part of the principal, of any bond hereby secured—notice of any such substituted provision to be given to the Trustee; but in no event shall any vote be cast upon any of said shares in violation of the provisions of section 3 of Article Two hereof."

Re-examination of Geo. W. Lamb by Counsel for Louisville & Nashville Railroad Company:

One can tell as a matter of traffic record the amount of revenue to the Louisville & Nashville Railroad Company from traffic originating or terminating on the South & North, as well as other feeder lines to the Louisville & Nashville Railroad Company. It is not a mere matter of conjecture. This South and North Alabama Railroad is a connecting link in the L. & N.'s system, connecting the lines south of Montgomery with those north of Decatur. As an independent road, the South & North Alabama was unable to live, and could not conduct its operation; but as an integral part of the L. & N. system, it has been able to build up a very large and valuable traffic, besides benefitting the rest of the system, and this and other roads operated by the L. & N. for the account of owners are a benefit to the system of the L. & N. regardless of the fact that it does not take their profits. And the mileage of these roads is taken into account, and included in the grand total of mileage of roads operated, owned, leased or controlled by the Louisville & Nashville Railroad.

While I am not a financial man, and cannot testify as to the values of separate railroads, yet from my knowledge of the way in which the public regards the shares of the Louisville & Nashville Railroad Company, and from the way in which the accounts are kept under the provisions of the Interstate Commerce Commission, I can form a general estimate of the reasonableness of the assets of the Louisville & Nashville Railroad as a whole; and my opinion is that the tangible properties of the Louisville & Nashville Railroad Company in other states, of which I have seen a list, are worth not less than their book value of $130,000,000.

595 Referring again to the old case of Louisville & Nashville Railroad Company v. Siler, et al., where gross and net earnings for Kentucky were shown, those earnings included the Ohio earnings, and also included the property of the entire road in Kentucky and Ohio, as an offset against those earnings.

The methods of apportioning revenues, however, used in 1905 (when that suit was instituted) were not the same as the methods used in 1912. The methods used prior to July 1, 1906, was to assign the revenues to the states on a straight mileage prorate; that is to say, track mileage prorate. Since 1907, it has been changed to consider the revenues of the individual shipment. There are a number of items entering into the freight and passenger revenues that arise from sources other than the movement of passenger and freight traffic over the mileage of the road. And so as to expenses,

all of the expenses are not between stations. The terminal expenses constitute a very large proportion of expenses; and referring to the case of Ohio, the terminal in Cincinnati is about as large as any terminal on the Louisville & Nashville System.

Taking the Louisville & Nashville's strict freight and passenger operating business done at stations in the State of Kentucky, as measured by the remittances from the State of Kentucky, as compared with remittances from all over the system—it being understood, of course, that the remittances from stations include the earnings in each state, as well as the earnings in other states, and the earnings of other companies that are collected for their account by the L. & N.—the Kentucky proportion, that is, the remittances from stations in Kentucky, constitute about 24% of those from the whole system.

The rule of apportionment adopted by the Association of American Railway Commissioners, which I read into my testimony on cross-examination, at the request of counsel for the Board has not been enforced by any of the Railroad Commissions, to which the lines for which I keep the accounts, are subject, and has not been adopted, so far as I know of by any railroad company.

596 Witness Lamb was here excused temporarily and afterwards being recalled, testified as follows:

At the former sitting of the Board, attention was called to a statement in the Louisville & Nashville Railroad Company's protest against the tentative assessment, in which protest it was stated in substance that the Board had for the current year assessed other public service corporations at a lower percentage than 80%. I have prepared statements with respect to the assessments of the franchises of certain corporations by the Board for the current year, based on investigations which I have made with respect to the following companies, to-wit: Cumberland Pipe Line Company and the Louisville Gas Company, Louisville Lighting Company, and the Kentucky Traction & Terminal Company, the Louisville Street Railway Company, and the Pullman Company.

The Cumberland Pipe Line Company on a capitalization of its net income at 6% gave a total valuation of $1,780,000. Its stock and bonds were not shown. The assessed value was placed at $800,000. The percentage of assessment to total valuation was 44.94%.

The Louisville Gas Company, taking the capital stock outstanding and using quotations, as shown in the Louisville Courier Journal for June 30, 1912, and using par value of its first mortgage bonds, produced a total valuation of $4,520,000. The assessed valuation was $2,250,000, or 49.78%. The total valuation which I have given was on the market value of the capital stock at $120. per share, and the first mortgage bonds at par. I did not attempt to get the average selling price of the stock during the year, but took the quotation at the close of the year.

In these cases, I have used the market value of stocks and bonds wherever possible, and have taken the values of the same date,

to-wit, June 30, 1912, uniformly, or rather June 29, as June 30, was Sunday.

Referring again to the Louisville Gas Company, I do not know that its stock at any time during the fiscal year ending June 30, 1912, sold at less than $120. per share. I do know that during the current year the city of Louisville sold its interest in that company, which was a very large proportion of the stock, at $150. per share. And the figure used by the Board of Valuation and Assessment in its memoranda or working papers, with reference to that corporation, is $120. as the value of the stock per share.

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The Louisville Lighting Company on the basis of capitalization of stock and bonds, in the bonds and preferred stock, par value was used. I was unable to get any quotation on that, and the common stock outstanding was shown at the quotation of 60. This is the same valuation placed upon it by the Board. The total valuation for the Louisville Lighting Company is $5,764,220; assessed valuation is $3,800.00; the percentage of assessed value to total value is 65.92%.

Lousville Street Railway Company: The second mortgage of 4½ per cent gold bonds were figured at $96.25, consolidated 5% gold bonds at $105, the general mortgage 5% bonds at 102⅝, common stock outstanding $96.25, preferred stock outstanding $113, producing a total valuation of $19,359,481; assessed value $11,650,000; percentage of assessment to total value 60.17%.

The Pullman Company: Capital stock outstanding $120,000,000 at par, was worth on June 29, 1912, $193,200,000 at $161 per share. We deducted from that amount the amount used in manufacturing, which figures were obtained from the memoranda of the Board, leaving as the total value $175,200,000, of which .009% is in Kentucky on a mileage basis, giving a valuation of $1,576,800, which is assessed at $600,000; percentage of assessment being 38.05%.

Kentucky Traction & Terminal Company: The valuation is arrived at by capitalizing interest paid $129,883, at 6%, giving a valuation of $2,164,700, which was assessed at $1,200,000, or at 55.43% of the valuation.

I file the statement showing the foregoing, and mark the same for identification Exhibit No. 30.

With respect to the first company of which I have spoken, the Cumberland Pipe Line Company, I made a copy of the memoranda found in the jacket enclosing the papers relating to this corporation in the office of the Auditor of Public Accounts, pertaining to the assessment of that Company for the year 1913, and I also made a copy of the report of that Company, the Cumberland Pipe Line Company, as reported to the Auditor for the year ending June 30, 1912. These papers show an amount of $107,139, which apparently has been capitalized at 6%, producing an amount of $1,780,000. 80% of this is taken showing $1,424,000. The following notation then appears:

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"$1,400,000 is an 80% assessment." On the jacket shows the total capital $800,000, less tangible property $361,924, the franchise $438,076. The tax $2,190.38, was finally assessed and paid on July 16,1913. I do not know who owns this company nor who are its

officers; its office is located at Somerset, Pulaski County, Kentucky.

I file the two documents to which I have referred marking the same Exhibit Geo. W. Lamb No. 31, which consists of three attachments, the first being a certificate of Charles J. Veling, Chief Clerk of the Corporation Department in the Auditor's office, as to the correctness of these papers, and the other two being (1) a memorandum, marked No. 1, and (2) a copy of the report of the Cumberland Pipe Line Company, commonly called the franchise report.

With reference to the Louisville Gas Company, I file as part of my testimony marked Exhibit Geo. W. Lamb No. 32, consisting of three attachments, to-wit, certificate of Charles J. Veling, the memorandum referred to therein, and a copy of the report of the Louisville Gas Company. This memorandum is what is called a "working paper," pertaining to the Louisville Gas Company, showing the action of the Board, and how they reached their result. The stock value $3,-600,000, is shown first, multiplied by 120 producing a total amount, as the market value, of $4,320,000, to which is added an amount of $200,000, giving a total of $4,520,000. The notation appears: "Under the terms of the merger, the city received $150.00 per share for its stock, and other holders the equivalent of $120.00." An amount of $21,752 is shown, to which is added $216,000
599 producing a total of $237,752, which it capitalized at 6%, producing $3,962,500. There is then shown a figure of $4,-520,000, arrived at as I have previously stated, producing a total amount of $8,482,500, which is divided by 2, producing an average of $4,241,250, 80% of which is taken showing $3,393,000. I find that the $21,752 is also shown on another part of the memorandum as interest, and the $216,000 as dividends, from which is deducted a credit of $74,920, leaving $152,832 net. This is capitalized at 6%, producing $2,547,000. The value of stock and bonds, $4,520,000, is added, producing a value of $7,067,000, which is divided by 2, giving an average value of $3,533,000. Eighty per cent of this is taken, resulting in $2,826,400. This $3,533,000 is again shown, and 70 per cent taken, producing $2,473,100, from which is deducted $2,250,000, leaving $220, no figures being carried beyond that. There then appears an amount $4,520,000 as total capital on basis of shares at $120, and bonds at par. Seventy per cent of this is taken, producing $3,164,000. This memorandum also shows $3,160,000 equals 70%. On the jacket is shown total capital, $2,250,000, less tangible property &c., $732,175, franchise $1,517,825, tax $7,-589.13, July 19, 1913, as finally assessed and paid on.

The witness was then further examined along the same lines as to other companies referred to by him, and on account of the great number of figures in the testimony and the difficulty of reducing it, it is here stated in full as follows:

I now ask you the same question with respect to the Louisville Lighting Company?

A. I will file as part of my testimony marked "Exhibit George W. Lamb No. 33, a certificate with three sheets attached with respect to the Louisville Lighting Company.

Without going over all that memoranda, please give the result of the working papers, copies of which are attached to the franchise report of that company?

A. On the basis of bonds and stock the total value is shown $5,763,800, 80 per cent of which is taken resulting in $4,611,040.00. A statement appears "$4,500,000 for a tentative assessment seems right." "$5,500,000, tentative assessment." On the second sheet of the memoranda, bonds and stock are shown as $5,442,255,
600 80 per cent of which is taken, amounting to $4,353,600, 70 per cent of $5,442,255 is shown on the memorandum as $3,809,578.50.

What does the jacket show?

A. On the jacket is shown, total capital $3,800,000, less tangible property, &c., $817,240.00, franchise $2,982,760; tax $14,913.80 as finally assessed and paid on July 19, 1913.

I will ask you the same question with respect to the Louisville Railway Company?

A. I file as part of my testimony marked "Exhibit George W. Lamb No. 34", a certificate with two statements attached with respect to the Louisville Railway Company.

The papers in question were thereupon filed with and as a part of the deposition of the witness, and were marked for identification "Exhibit George W. Lamb No. 34" and will be found in a separate volume marked "Exhibits."

A. The total capital stock as shown by this statement at one point is $17,801,000, arrived at by taking the interest of $508,750—of interest and dividends less a deficit, showing the total capitalization of $17,801,000. 70 per cent is then taken making $12,460,700.

On the stock and bond plan the total value is shown as $18,955,500, 70 per cent of which is taken, making as total capital $13,268,850. Notation on this memorandum reads: "This company promptly paid last year's assessment. Would suggest that tentative assessment be same as last year."

On the jacket, the total capital is shown as $11,650,000, less tangible property, &c., $3,303,580, franchise $8,346,420, as finally assessed and paid on July 3, 1913.

I notice on Exhibit No. 30 which you have filed, the capitalization of the stock and bonds of the Louisville Railway Company totals $19,359,481. Will you please state how that sum is arrived at?

A. By applying to the second mortgage bonds of a par value of $2,000,000, the market value $96.25, producing $1,925,000; applying to the par value of the consolidated mortgage 5 per
601 cent bonds $5,997,000 market value of $105, producing $6,276,850; Louisville City Railway 6 per cent gold bonds, par value $2,000, for which no quotation is shown, and the par value is used. The general mortgage 5 per cent gold bonds, $3,000,000 par value, at the market value of $102⅝, producing $3,078,750.00, common stock outstanding $5,456,500 par value, at $96.25, market quotation, produces $5,251,881. The preferred stock outstanding $2,500,000 at par, at the market value of $113, produces $2,825,000. The total or aggregate of these items being $19,359,481.

I note at the foot of the report of the Louisville Railway Company this statement, as shown by the copy you file as a part of Exhibit No. 34, to-wit: "The dividend received from the Louisville & Interurban Railroad Company, amounting to $224,737.57, not included in the above." Do you know anything about the relation between the Louisville Railway Company and the Louisville & Interurban Railroad Company?

A. The Louisville & Interurban Railroad Company is a subsidiary company of the Louisville Street Railway Company.

Do you know any reason why the earnings or dividends declared to the Louisville Railway Company as a stockholder in the Louisville & Interurban Railroad Company, should not have been included as a part of the earnings, to be capitalized against the Louisville Railway Company?

A. No, sir.

Dividends received by the Louisville & Nashville Railroad Company in subsidiary companies, or other companies in which it owns stock, have been included in its gross and net earnings, have they not, for the year ended June 30, 1912?

A. They have—yes, sir.

Roughly speaking, how much additional capitalization of the Louisville Railway Company would have been ascertained if the item of $224,737.57 received by the Louisville Railway Company from the Louisville & Interurban Railroad Company, as dividends for the year ended June 30, 1912, had been included in the
602 capitalization of the total net earnings of the Louisville Railway Company?

A. Something in excess of $3,700,000.

What did you say the capitalization of the net earnings of the Louisville Railway Company, according to the memorandum attached to the exhibit you have filed, made?

A. $17,801,000.

Now, if this item of dividends from the Louisville & Interurban had been added to that sum, what would have been the total capitalization of the Louisville Railway Company on the basis of net earnings, including interest and dividends only?

A. About $21,546,600, approximately.

And what percentage would $11,650,000 be of the latter sum, the amount of the assessment of the Louisville Railway Company's total capital stock?

A. About 54 per cent.

Mr. Bosworth: With that out of there, what would have been the per cent?

Mr. Rhea: 60 and a fraction.

I now ask you the same question with respect to the Pullman Company?

A. I file as part of my testimony, marked Exhibit George W. Lamb No. 35, a certificate with five pages, numbered 1 to 5, with respect to the Pullman Company.

The papers in question were thereupon filed with and as a part of the deposition of this witness, and were marked for identification

"Exhibit George W. Lamb No. 35" and will be found in a separate volume marked "Exhibits".

State in substance what the working papers attached to that exhibit show as to the action of the Board?

A. Shows the gross income as $12,719,552, and the operating car revenue of $10,831,718, showing that the operating car revenue is 85 per cent of the gross income. The mem-randum then shows that 85 per cent of the revenues of the company are derived from operation of cars, therefore, that proportion of its entire capital
603 must be employed as a common carrier. The net car operating revenue, less taxes, capitalized at 6 per cent is $165,000,000. The mileage within and without Kentucky shows that Kentucky's proportion is 9/10 of 1 per cent, but the figures show .009 as a multiplier of the $165,000,000. Applying this percentage to the $165,000,000, gives for Kentucky $1,485,000.

I want you to show the mileage shown by that memorandum?

The memorandum shows the mileage within and without Kentucky. The total is 216,969 miles. In Kentucky 1,936 miles.

Go on?

A. The memorandum states, under stock and bond plan "In report to the Auditor, Company states its stock is worth $105 per share, which is a very low valuation on 8 per cent. Stock." On this basis 120,000 shares, it is worth at $105, $126,000,000, total capitalization, deducting $18,000,000 used in manufacturing, leaving $118,000,000. This figure is multiplied by .009, giving $972,000 in Kentucky.

On sheet 2 of the memorandum, the total capital employed in the business of the company, as shown by statement to Interstate Commerce Commission, is $148,000,000, employed in manufacture, deduct $22,200,000, leaves $125,800,000. This amount is multiplied by .009 giving $1,132,200 in Kentucky. $972,000 is added in Kentucky, stock and bonds, $1,485,000 in Kentucky, capitalization net income, giving a total of $3,589,000, which is divided by 3, giving $1,163,000 average in Kentucky. 80 per cent is taken of this amount, producing $932,400 in Kentucky.

On the jacket, total capital, $600,000, less tangible property, etc., $241,265, franchise $358,735, tax $1,793.68, as finally assessed and paid on July 3, 1913.

Now, I will ask you the same question with respect to the Kentucky Traction & Terminal Company?

A. I file as Exhibit George W. Lamb No. 36, a certificate with two attachments. No. 1 being a memorandum found in the jacket, and No. 2 being copy of the report to the auditor of Public
604 Accounts.

The said papers were thereupon filed with and made a part of the deposition of this witness, and were marked for identification "Exhibit George W. Lamb No. 36," and will be found in a separate volume marked "Exhibits."

A. This memorandum shows $129,883, divided by 6, apparently the capitalization, giving $2,164,700. This is multiplied by 8, and the figures are shown as $1,731,760, indicating 80% of the

value. The memorandum then shows the following: "The amended report of this company shows payment of interest in the above sum, but also shows a large deficit. There is no information in report as to the value of its stocks and bonds. It is probable the Company is highly over-capitalized. Because of its overcapitalization, and the uncertain value of its stock and bonds, would suggest a tentative assessment of $1,318,080, an increase of $600,000 over last year."

The jacket shows total capital $1,200,000, less tangible property, etc., $711,080, franchise, $488,920, tax $2,444.60, as finally assessed and paid on August 8, 1913.

Col. Colston: I will ask you to refer to the report, determine and state what the amount of $129,883 represents, as shown by that report?

A. On the detail of the figures, showing up net income in the report opposite the item, interest, is shown the amount $129,883.92.

I will ask you to also refer to the report and state what is shown for maintenance of equipment?

A. Opposite the item "Maintenance of Equipment," is shown $200,432.32

What is shown on that report as the amount of tangible property of all kinds of the company?

A. Amount of tangible property is shown as $550,380.

Can you state roughly how that amount of maintenance of equipment compares with the amount of tangible property, that is, as to the apparent reasonableness or unreasonableness of the amount charged for maintenance of equipment from your experience
605 in railroad accounting?

A. It appears to me to be rather excessive, the maintenance of equipment representing approximately 37 per cent. of the total tangible property.

Mr. Crecilus: What is the per cent. of the L. & N.?

The Witness: It is away down below that. I know it is way below that.

Give the total maintenance of equipment of the Louisville & Nashville system?

A. Total maintenance of equipment of the Louisville & Nashville system for 1912 was $10,071,307.57.

Which is what per cent. of the tangible value of the Louisville & Nashville system, as shown on your exhibit, George W. Lamb No. 6, $178,927,000 and some odd?

A. It is about 5.6 per cent.

Gen. Garnett: Right in that connection, what is the per cent of your maintenance of equipment within Kentucky to the assessed value of the tangible property in Kentucky?

Col. Stone: That would hardly be a fair comparison, as this maintenance of equipment is to the whole system, and you want the tangible value of the whole system. This traction company is all in Kentucky, I imagine.

A. The approximated amount shown in our report to the Railroad Commission of Kentucky for June 30, 1912, was about $3,500,-

000, which, as compared with something like $30,000,000 of tangible assessment, would be roughly 10 per cent.

Col. Colston: Of course, the tangible assessment for the lines over which the equipment runs would necessarily include the tangible assessment for some of those roads which are not included in the assessment by the L. & N.

Please compare the "Other Expenses" without other explanation, in the Kentucky Traction & Terminal Company's report, with "Other Expenses," as shown by the Louisville & Nashville Railroad Company, comparing each item with the total expenses for the two companies, as shown in the two reports, giving the percentage of each, that is, state what percentage of the total expenses
606 shown, the, the other expenses shown are, for each company.

A. The item "Other Expenses" shown in the report of the Kentucky Traction & Terminal Company to the Auditor is $124,302.69, out of the total of $579,236.82, or something over 21 per cent. In the report of the Louisville & Nashville Railroad Company to the auditor of public accounts, the "Other Expenses" are shown as $250,049.33, out of the total of $48,295,333.25, or slightly over .5 per cent.

The total value of the six companies as shown on my exhibit No. 30, is $35,165,201.00; the assessed value is $20,300,000.00. The assessment is 57.72 plus per cent of the valuation.

Answering a question propounded by the Attorney General when I was speaking of the Louisville Railroad Company's assessment, which I promised to answer later, I will say that in the assessment of that company for 1913, there was a reduction of $500,000.00 below the assessment of the same company for 1912.

Cross-examination of Witness Lamb by Attorney General Garnett:

If the capital stock of the Cumberland Pipe Line Company is $1,000,000, par value and the market value of the stock is $70.00 per share, the capital on that basis would be worth $700,000.00. And 80 per cent of that would be $560,000. And if you deduct from that the tangible property $361,924.00, it leaves $198,076.00.

The Attorney General then asked the witness the following question:

"This report shows that this corporation has no surplus, that it has undivided profits of $145,854.29, that the value of all other assets *are* $122,742.08, which makes the total value of all the money and other assets owned by this company $267,000 in round numbers. It also shows that it had an indebtedness of $38,638.97, and that its gross earnings were $201,827.94; that its expenses
607 were $94,688.11, which left the net income of $107,139.83.

From your experience and your knowledge of stock in corporations, would you regard the stock in a corporation whose capital was a million dollars that had no greater assets than this company is shown to have had, to be worth exceeding $70 per share?" to which the witness answered:

"I know nothing about the corporation, and without examining the net assets, I would not care to express an opinion on it."

I am not acquainted with the dealings of people generally in stocks and bonds. If a bid on the New York Stock Exchange for $70. was made for this stock that would be the measure as represented by the value placed upon it by the stock market quotation.

I do not know whether the business of a pipe line is considered a hazardous business or not. I have no knowledge of nature of business or the value of the stock of this corporation. In arriving at the valuation I have given, I simply took the amount shown to be the net earnings of the corporation, capitalized them at 6%, without regard to the ownership or the business that the corporation was engaged in, and found the total valuation to be $1,780,000.

I do not know what dividends were paid upon the stock.

As to the Louisville Gas Company, from a copy of their report, I see that a dividend of 6% was paid. The report of the Gas Company to the Auditor as of June 30, 1912, shows gross earnings $452,863.59; total expenses for salaries, wages, interest, dividends, maintenance of equipment and depreciation, amount to a sum which leaves a deficit of $49,092.92. From the current year's operation, as reflected by that report, using the figures stated in the report, they did not earn a net amount sufficient to pay 6%.

I am a citizen of Louisville, but only know from newspaper comment of the effort of the Byllesbys to consolidate the interests of the Lighting Companies, and I do not know what effect the efforts of the Byllesbys in that direction had on the value of the Louisville Gas Company's stock, nor as to any of the facts in connection with those efforts or their final result.

608 If I had made calculations to arrive at a total value of the capital stock of the Louisville Gas Company according to the same plan used by me in the case of the Cumberland Pipe Line Company, the value of the franchise, based on net earnings would have been $3,962,500., which is a 100% valuation, 80% of which would be $3,170,000; in that I have not deducted the deficit as shown by the report in arriving at that valuation.

The deficit shown by the report of the Louisville Gas Company is $49,092.92. Embraced in this deficit is interest $21,752.54, and dividends $216,000., making a total of $237,752.54. Deducting from this $237,752.54, the deficit of $49,092.92, would leave net income of $188,659.62. Capitalizing this amount at 6%, would give $3,144,327., 80% of which is $2,515,461.

With reference to the Louisville Lighting Company, in arriving at the valuation of $5,764,200., of the capital stock, I followed the stock and bond plan. This is one of the companies absorbed by the Byllesbys. The amount of interest and dividends paid by the Louisville Lighting Company aggregated $332,539.31. Deducting from this the deficit $279,959.44, leaves as a surplus $52,579.87, which capitalized at 6% gives $876,331.16. And that amount equalized at 80% gives $701,064.93; and this is the result that would have been reached instead of $5,764,000., if in fixing the

value of the franchise of the Louisville Lighting Company, I had followed the same plan which I followed in arriving at the value of the franchise of the Cumberland Pipe Line Company.

In arriving at the valuation of the franchise of the Louisville Street Railway of $19,359,481, I adopted the stock and bond plan. I am told that the dividend on the outstanding common stock of that company is 4% and the dividend of the preferred stock is 5%. In making the valuation of the franchise of the Louisville Street Railway Company, I used the stock and bond plan. In making the valuation of the Cumberland Pipe Line Company, I used the capitalization of income plan, and not the stock and bond plan. I did not have the information as to the stocks and bonds of that company.

609 The interest and dividends paid by the Louisville Railway Company amounted to $1,179,400. The deficit was $111,235.06, leaving a surplus of $1,068,164.94; this capitalized at 6% is $17,802,649.00, 80% of which is $14,242,119.00. The property of the Louisville Interurban Railroad Company is in Kentucky.

In making my calculation on the stock and bond plan, I did not deduct the stocks held by the Louisville Railway Company in the Louisville & Interurban Railroad Company. If the sum of $224,737.57 represents a 6% dividend received by the Louisville Railway Company from the Louisville & Interurban Railroad Company, this would indicate that the Louisville Railway Company owns stock in the Louisville & Interurban amounting to $3,745,600. And if you assume that this stock was non-taxable and deduct that from the valuation which I made of the total capital of the Louisville Railway Company, this would leave $15,613,881, as a 100% valuation, of which 80% is $12,491,105.

As to the Pullman Company, on the second page of its typewritten report for the year ending June 30, 1912, a statement is made "no net earnings or income attributable to Kentucky." If I were attempting to arrive at the capital stock of this Company in Kentucky by capitalizing its net earnings, of course, I could not do so from that report.

Referring to the Kentucky Traction and Terminal Company's report, this report shows interest paid amounting to $129,883.92, and a deficit of $91,183.26, which would leave $38,700.66, as its net earnings, which capitalized at 6% would give $545,011. Included in this net amount shown here is an item referred to as "other expenses" amounting to $124,302.69, which is not accounted for and seems somewhat excessive. The figures I have given are a 100% valuation; 80% would be $516,000.00 in round figures.

In making up my exhibit Geo. W. Lamb No. 30, I was instructed to show the amount of the capital stock on the stock and bond plan wherever it was possible to obtain that information, and where that was impossible then to use the capitalization of net income plain; and I followed these instructions — and not because the

610 plan adopted would give a higher amount than some other amount. The information I obtained was from the memo-

randa found in the jackets of the reports of these various companies; the jackets kept by the Board.

As to the Pullman Company, the net earnings of the entire system could have been capitalized and then an apportionment could have been made to Kentucky on a mileage basis, and this is the method adopted by the Board. The total gross income is taken at $12,719,552., and then the operating car revenue of $10,831,718. is taken, showing that the operating car revenue was 85% of the gross revenue, and the mileage proportion of the gross income is taken in Kentucky. From the net car operating revenue of $10,831,718., taxes of $931,134.00 is deducted, leaving $9,900,584. This is capitalized at 6%, producing $165,000,000., and of this amount Kentucky's proportion is obtained on a mileage percentage basis, bringing into Kentucky $1,485,000. The amount of the assessment was $600,000.

"By General Garnett: I will ask you if it is not a fact that the memorandum you referred to made by the Board that you found in the jacket containing the report of the Pullman Company, were not the four memoranda made in pencil on four yellow slips of paper marked 1, 2, 3, and 4, and if in making your calculations, you did not adopt No. 2, which gave the largest amount of any of the calculations contained in the jacket.

A. No, sir; and my answer in qualifying that is that the stock and bond plan shown on sheet 3 is figured at $105. per share, and I have applied the market quotation of $161., adopting the plan as indicated by sheet 3 of your memorandum, substituting the market value of the stock on June 29, 1912, for your $105. per share.

Then the fact is you did not follow either one of the calculations as made by the Board, but adopted such part of each one that would get you the result desired?

A. No, sir; the plan, as I have previously answered, was to apply the stock and bond plan where I could get that information, and that was the rule for following that plan.

611 Now, is it not a fact that yellow slip No. 3, which followed the stock and bond plan, shows a valuation in Kentucky of $972,000.00?

Col. Stone: That is where you use the value of $105.00 per share.

A. That is true, using the valuation of $105.00 per share.

Now then, take eighty per cent of that and say what the 80% equalization would be?

A. 80 per cent of $972,000.00 is $777,600.00.

That is within $170,000 of what the assessment was fixed at by the Board, is it not?

Col. Stone: The assessment was fixed at $600,000.00.

Mr. Rhea: Within $177,000 of what it was fixed at by the Board?

The Witness: Yes, sir.

Col. Stone: It was within three-fourths of 80 per cent; in other words, about 60.

Mr. Lamb, you said a moment ago in making these calculations you followed directions. Whose directions did you refer to?

A. I was instructed by Mr. Colston to prepare a statement showing the capitalization on the stock and bond plan, where I could obtain that information.

Now, you could have obtained that information in fixing the value of the Pullman Company's franchise, could you not?

A. I did obtain it.

You did obtain that, and obtained the result as indicated on George W. Lamb No. 30.

A. I did."

I could not tell, without comparing them, whether or not the method adopted by me in making up my exhibit No. 30 did in fact in each case reach the highest figure, but upon making the comparison at the present time, I see that it does.

The L. & N. R. Co., could not have declared a 15% dividend out of its net earnings and had anything left to go on. The
612 Company's report for last year does not show a surplus of $9,560.00, after paying dividends. That was the surplus before dividends were deducted, and the dividends were $4,200,000., being at 7%. The company could have declared a 15% dividend if it had desired to pay out every bit of its net income; and yet it would still have had a balance to the credit of profit and loss of $37,000,000.

At the close of the year the company had on hand in cash to pay dividends and interest on bonds and for other account $11,085,960; that had to take care of interest as well as dividends. As shown by the income account of June 30, 1912, the interest on the bonded debt amounted to $6,328,640.67, and the dividends for that year were $4,200,000., which would make a total of dividends and interest of $10,528,000.

While we had in round figures on June 30, 1912, cash on hand amounting to $11,000,000, and only had to pay $5,000,000. in dividends and interest, I cannot say that this would leave us on July 1, a cash surplus of $6,000,000. We had outstanding audited vouchers and unpaid charges which were entered as a debit of the company, but which were unpaid, amounting to nearly $5,000,000., and these, with other items, were equal to the amount of the cash.

Referring again to the Pullman Company, and to my exhibit No. 35, I find these words written by somebody on one of the papers in the jacket "In report to the Auditor, company states its stock is worth $105. per share. This is a very low valuation on 8% stock." The capitalization based on the stock and bond plan amounting to $927,000. in Kentucky on the Pullman Company, values the stock apportionable to Kentucky, at this low rate, to-wit, $105. per share. In Exhibit No. 30, in fixing the value of the Pullman stock at $161. per share, I did not take an isolated date, June 29, 1912. From an examination of certain reports I found that the quotations ranged from $160. to $163. for several years. The reports I examined were Poor's Manual Reports.

Exhibits With Testimony of Geo. W. Lamb.

The exhibits filed by the witness, Geo. W. Lamb during the course of his testimony, being 36 in all, are as follows:

613 Kentucky Franchise Tax Assessment, 1913.

EXHIBITS GEO. W. LAMB Nos. 1-36.

Louisville and Nashville Railroad Company.

Statement Showing Par Value and Average Market Value of the Capital Stock and Outstanding Bonds of the Louisville & Nashville Railroad Company for the Fiscal Year Ended June 30th, 1912.

	Par value.	Average market value per $100 par value for a year.	Total market value.
Stocks:			
Louisville & Nashville R. R. Co. 600,000 shares common stock	$60,000,000.00	152.0825	$91,249,500.00
Bonds:			
Evansville, Henderson & Nashville Division, 1st Mortgage Gold ..	1,080,000.00	104.7307	1,193,109.20
Pensacola Division, 1st Mortgage Gold	274,000.00	105.7500	289,755.00
Southeast and St. Louis Division, 1st Mortgage Gold	3,500,000.00	113.0000	3,955,000.00
Pensacola and Atlantic Railroad, 1st Mortgage Gold	1,873,000.00	110.7220	2,073,823.06
New Orleans and Mobile Division, 1st Mortgage Gold	4,993,000.00	119.2662	5,954,961.17
New Orleans and Mobile Division, 2nd Mortgage Gold	1,000,000.00	118.0190	1,180,190.00
General Mortgage Gold	4,689,000.00	114.8300	5,384,378.70
Henderson Bridge, 1st Mortgage Gold	1,126,000.00	106.0000	1,193,560.00
Louisville, Cincinnati and Lexington Railway, General Mortgage Gold	3,258,000.00	105.1960	3,427,285.68
First Mortgage 50-Year Gold	1,749,000.00	112.0570	1,959,876.93
Nashville, Florence and Sheffield Railway, 1st Mortgage Gold	1,996,000.00	108.8400	2,172,446.40
Unified 50-Year 4% Gold	57,871,000.00	99.0340	57,311,966.14
Newport and Cincinnati Bridge Company, General Mortgage Gold	1,400,000.00	.....	1,400,000.00
L. & N. M. & M. Ry., 1st Mortgage Gold	4,000,000.00	103.4200	4,136,800.00
L. & N.—Paducah & Memphis Division, 1st Mortgage Gold	4,619,000.00	95.5140	4,411,791.66
Atlanta, Knoxville and Northern Railway, 1st Mortgage Gold	999,000.00	112.1419	1,120,297.58
Atlanta, Knoxville and Cincinnati Division, Gold	20,245,000.00	92.6830	18,763,673.35

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Southeast and St. Louis Division, 2nd Mortgage Gold	2,998,000.00	70.8430	2,123,873.14
Kentucky Central Railway, 1st Mortgage Gold	6,704,000.00	94.3620	6,326,028.48
Atlanta, Knoxville and Northern Railway, 1st Consolidated Mortgage Gold	500,000.00	.....	500,000.00
St. Louis Property, 20-year 1st Mortgage Gold	617,000.00	.....	617,000.00
First Mortgage Trust Gold	4,705,000.00	109.3210	5,143,553.05
L. & N., Southern, Monon Collateral Joint Gold—L. & N. Proportion	5,882,500.00	87.4870	5,146,423.30
Total Bonds	$136,078,500.00		$135,785,792.84
Recapitulation.			
Total Stocks	$60,000,000.00		$91,249,500.00
Total Bonds	136,078,500.00		135,785,792.84
Total Stocks and Bonds	$196,078,500.00		$227,035,292.84

NOTE.—In the case of Bonds for which no quotations are available the Par Value is shown as average Market Value.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by C. W.
Written by L. S. W.
Footings Verified by C. R.
Called Back 8/14/13.
Read by C. R.
Watched by H. D.

G. W. L. #1.

615 EXHIBIT G. W. L. No. 2.

Louisville and Nashville Railroad Company.

Statement Showing for the Fiscal Year Ended June 30, 1912, the Total Value of All the Property of the Louisville & Nashville Railroad Company, Both Tangible and Intangible, Arrived at by Capitalization of Income from All Its Lines and Investments Before Deducting Charges Against Income Such Capitalization being Computed on Basis of Composite Per Cent, Six Per Cent and Eight Per Cent, Respectively.

Operating Revenues		$50,793,419.51
Operating Expenses		35,913,716.67
Net Operating Revenues		14,879,702.84
Outside Operations—(Net)—Deficit		8,178.92
Total Net Revenue		14,871,523.92
Taxes		1,688,756.05
Operating Income		13,182,767.87
Income from rents:		
Clarksville & Princeton Branch	$12,039.70	
Paducah & Memphis Division	206,506.20	
Equipment	783,439.03	
Various Sources	53,615.62	
		1,055,600.55
Income from Investments		1,189,001.55
Income from Operation of Georgia Railroad Lease		68,911.08
Interest Various Sources		704,869.70
Total Income		$16,201,150.75
Total Capialization at 6.524%		$248,331,556.58
6. %		270,019,179.17
8. %		202,514,384.38

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by Copied from Original No. 2.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/12/13.
Read by L. S. W.
Watched by H. D. 11/12/13.

Louisville and Nashville Railroad Company.

Statement Showing Value of Tangible Property of the Louisville and Nashville Railroad Company Outside of the State of Kentucky as of June 30th, 1912.

Main Stem	Tennessee	$2,750,390.41
Chesapeake & Nashville Division	"	227,496.34
Nashville, Florence & Sheffield Division	Tennessee & Alabama	2,440,737.74
Montgomery & Prattville Branch	Alabama	104,641.98
Birmingham Mineral Division	"	7,345,342.75
Alabama Mineral Division	"	3,167,463.09
Mobile & Montgomery Division	"	4,431,434.89
Alabama & Florida Division	Alabama and Florida	1,375,040.13
Bay Minette & Ft. Morgan Railroad	Alabama	237,710.81
New Orleans & Mobile Division	Alabama, Mississippi & Louisiana	10,687,364.59
Pontchartrain Railroad	Louisiana	27,503.80
Knoxville Division	Tennessee	10,298,089.87
Atlanta Division—New Line	Tennessee & Georgia	3,488,635.13
Atlanta Division—Old Line	Tennessee, Georgia & North Carolina	5,204,156.80
Cumberland Valley Division	Tennessee & Virginia	3,554,167.52
Middlesborough Railroad	Tennessee	34,436.10
Memphis Line	"	8,160,205.17
Clarksville & Princeton Branch	"	169,079.39
Clarksville Mineral Branch	"	671,943.04
Henderson Division	Tennessee & Indiana	5,191,244.74
St. Louis Division	Indiana, Illinois & Missouri	7,717,502.68
Southern Alabama Division	Alabama	2,132,494.84
Myrtlewood Branch	"	828,973.64
Pensacola Division	Florida	967,535.54

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ROBERT L. GREENE, AUDITOR, ETC., ET AL.

Pensacola & Atlantic Division	"	4,040,573.20
Yellow River Branch	Alabama & Florida	58,853.16
Newport & Cincinnati Bridge	Ohio	1,158,796.00
Paducah & Memphis Division	Tennessee	3,309,650.82
Shops	Various—Outside Kentucky	1,111,288.22
New & Old Decatur Belt & Terminal Company	Alabama	85,449.97
Stouts Mountain Railroad	"	40,639.66
Equipment—Proportion assignable to outside of Kentucky		26,630,959.26
Nashville & Decatur Railroad	Tennessee & Alabama	4,441,164.59
Long Branch Coal Railroad	Alabama	49,564.46
Swan Creek Railway	Tennessee	348,115.94
		$122,488,646.27
Deduct—Depreciation—Road and Equipment		12,656,721.70
		$109,831,924.57
Woodstock & Blocton Railway	Alabama	134,156.00
Augusta Belt Railway	Georgia	32,500.00
Lexington Terminal Railroad of Georgia	"	3,300.00
Monroe Railroad	"	100,000.00
Milledgeville Railway	"	35,719.00
Georgia Railroad	"	784,940.04
Missouri & Illinois Branch & Belt Railroad	Missouri	154,188.55
Cairo & Thebes Railroad	Illinois	1,691,267.03
Augusta & Summerville Railroad	Georgia	32,543.12
Lewisburg & Northern Railroad	Tennessee	908,507.68
Tuscaloosa Mineral Railroad	Alabama	524,813.28
Augusta Union Station	Georgia	36,125.00

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Terminal Railroad Association of St. Louis	Missouri	2,451,154.04
Nashville Terminals	Tennessee	3,177,069.25
Cincinnati Inter-Terminal Railroad	Ohio	162,744.22
Memphis Railroad Terminals	Tennessee	122,547.10
Real Estate, Timber and Quarry Lands	Various States	18,773.50
Donated Lands, Purchased from S. & N. A. R. R.	Alabama	25,000.00
Leasehold in Wiggins Property at Cincinnati	Ohio	50,000.00
Property & Improvements at Cincinnati	"	649,109.84
Real Estate Purchased at Cincinnati	"	76,350.00
Property at Memphis	Tennessee	20,286.60
Real Estate at New Orleans	Louisiana	36,211.74
Timber Lands for Creosote Works	Mississippi	16,601.47
Material in Private Sidings	Various States	1,250,505.68
Material and Supplies	" "	2,269,028.09
New Orleans, Mobile & Chicago Railroad	Louisiana, Mississippi, Alabama & Tennessee	6,322,416.35
Total		$130,917,782.15

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by C. R.
Called Back 10/1/13.
Read by H. D.
Watched by C. R.

#32.

#32

617 EXHIBIT GEO. W. LAMB NO. 4.

Louisville and Nashville Railroad Company.

Statement of Lines of the Louisville & Nashville Railroad Company in the State of Kentucky, Showing Assessed Valuation for Tangible Taxes for the Year 1912.

	Assessment.
Main Line	$8,035,059.00
Bardstown Branch	109,225.00
Bloomfield Branch	112,205.00
Chesapeake & Nashville Branch	40,745.00
Cincinnati Division	3,909,810.00
Clarksville & Princeton Division	60,550.00
Cumberland Valley Division—Including Straight Creek Br.	625,375.00
Chenoa Branch	48,640.00
Greensburg Branch	193,020.00
Henderson Bridge	1,000,000.00
Henderson Division	3,369,305.00
Madisonville—Providence Branch	98,880.00
Kentucky Division	3,140,315.00
Lexington—Paris Branch	181,500.00
Paris—Maysville Branch	453,390.00
Richmond-Rowland Branch	155,200.00
Knoxville Division	636,465.00
Halsey Branch	22,155.00
Jellico Branch	66,015.00
Kensee Branch	5,160.00
Pine Mountain Branch	92,570.00
Wilton Branch	23,400.00
Lebanon Branch	2,033,058.00
Lexington Branch	901,085.00
Shelby Cut-Off	106,720.00
Louisville, Harrods Creek & Westport Branch	13,840.00
Louisville & Atlantic Division	438,200.00
Memphis Line	544,340.00
Middlesboro Railroad	77,230.00
Newport & Cincinnati Bridge	1,049,540.00
Owensboro & Nashville Division	907,145.00
Shelby Branch	228,520.00
Springfield Branch	127,410.00
Total valuation of tangible property assessed against the L. & N. R. R. Co. as per Auditor's statement of June 28th, 1913	$28,806,072.00

The following properties which are assessed separately against their respective companies and not against the Louisville & Nashville Railroad Company are not included:

Wasioto & Black Mountain Railroad		304,085.00
Morganfield & Atlanta Railroad		116,410.00
Madisonville, Hartford & Eastern Railroad		244,305.00
Kentucky Highlands Railroad (New)	$47,370.00	
Kentucky Highlands Railroad (Old)	28,875.00	
		76,245.00
Elkton & Guthrie Railroad		(Not known)
Glasgow Railway		(Not known)

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by Copied from G. W. L. #33.
Written by L. S. W.
Footings Verified by C. K.
Called Back 10/21/13.
Read by H. D.
Watched by C. R.

W. 33.

618 EXHIBIT GEO. W. LAMB NO. 5.

Louisville & Nashville Railroad Company.

Statement of Values which are Separately Taxed in the State of Kentucky & Included in the Total Values of the Capital Stock, or Entire Properties of the Louisville & Nashville Railroad Company, Tangible & Intangible Arrived at Upon the Stock & Bond Plan and Upon the Capitalization of Earnings or Income Plan.

Statement Showing Values Representing Stocks Owned by the L. & N. R. R. Co., Incorporations which are Separately Taxed in the State of Kentucky and which Pay Taxes on all of Their Property of Every Kind in the State of Kentucky, and which are Included in the Total Values of the Capital Stock, or Entire Properties of the L. & N. R. R. Co., Tangible and Intangible.

Frankfort & Cincinnati Railway	$489,719.81
Elkton & Guthrie Railroad	15,175.00
Lexington & Eastern Railway	6,991,145.35
Kentucky Public Elevator Company	37,439.50
Colossal Cavern Company	30,163.17
Wasioto & Black Mountain Railroad	2,765,401.61
Morganfield & Atlanta Railroad	498,461.04
Kentucky Highlands	583,171.74
Central Transfer Railway & Storage Company	11,354.65
Madisonville, Hartford & Eastern Railroad	1,817,749.60

Louisville, Henderson & St. Louis Railway	519,788.73
Lexington Union Station Company	25,000.00
Clarksville & Princeton Branch—that part assessed against the Illinois Central Railroad	240,794.25
Chicago, Indianapolis & Louisville Railway	6,008,533.62
Nashville, Chattanooga & St. Louis Railway	6,597,525.25
Paducah & Memphis Division—Assessed against the N. C. & St. L. Ry	4,130,376.03
	$30,761,799.35

Statement Showing Capitalized Value of Income from Property Owned by the L. & N. R. R. Co., which is Separately Taxed in the State of Kentucky Included in Total Values of Entire Properties of the L. & N. R. R. Co., Tangible and Intangible, as Arrived at upon the Capitalization of Earnings, or Income Plan.

Rent of Paducah & Memphis Division	$206,506.20
Rent of Clarksville & Princeton Branch—that part leased to the Illinois Central Railroad Co.	12,039.70
Income from investments:	
Kentucky Public Elevator Company	1,680.00
Chicago, Indianapolis & Louisville Railway	236,830.12
Nashville, Chattanooga & St. Louis Railway	430,656.00
Central Transfer Railway & Storage Company	1,500.00
Lexington Union Station Company	1,000.00
Lexington & Eastern Railway Company	70,953.33
Results from operation of—	
Morganfield & Atlanta Railroad (Surplus)	31,828.73
Madisonville, Hartford & Eastern R. R. *(Deficit)	*43,393.38
Wasioto & Black Mountain Railroad (Surplus)	15,154.59
	$964,755.29

Total Capitalization at 6.524%	$14,787,788.01
6. %	16,079,254.83
8. %	12,059,441.12

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by H. D.
Called Back 10/22/13.
Read by H. D.
Watched by C. R.

619 EXHIBIT GEO. W. LAMB NO. 6.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Property of the Louisville & Nashville Railroad Company, Tangible and Intangible, Within and Without the State of Kentucky, as Arrived at on the Basis of Value of Stocks and Bonds, for the Fiscal Year 1912; *Also the Value of Franchise or Intangible Property Apportionable to the State of Kentucky Arrived at by Deducting* (1) *the Value of Properties Separately Taxed in the State of Kentucky, and* (2) *the Value of Tangible Property Both Within and Without the State of Kentucky, Wherever Situated; Also Proportion of Such Franchise or Intangible Value Assignable to the State of Kentucky on Basis of the Percentage that Mileage Operated, Owned, Leased or Controlled in the State of Kentucky, Bears to the Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of* 60% *of its Real Value.*

Total value of entire properties, tangible and intangible of the Louisville & Nashville Railroad Company, within and without the State of Kentucky		$227,035,292.84
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		30,761,799.35
		$196,273,493.49
Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072 raised to 100% assuming assessed value to be 60% of real value)	$48,010,120.00	
Without Kentucky (Ex. G. W. Lamb #3)	130,917,782.15	
		178,927,902.15
Value of L. & N. R. R. Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky		17,345,591.34

Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 100%	$4,282,643.85
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 60%	2,569,586.31

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by H. D.
Called Back 10/22/13.
Read by H. D.
Watched by C. R.

620 EXHIBIT GEO. W. LAMB NO. 7.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year 1912; *Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky Arrived at by Deducting* (1) *the Value of the Properties Separately Taxed in the State of Kentucky, as Arrived at on Capitalization of Net Income or Earnings Plan, and* (2) *the Value of Tangible Property, Both Within and Without the State of Kentucky, Wherever Situated; Also the Proportions of Such Franchise, or Intangible Values Assignable to the State of Kentucky on Basis of the Percentage that Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of 60% of its Real Value.*

Composite Percentage of 6.524% Used in Capitalization of Income.

Total value of entire properties, tangible and intangible of the Louisville & Nashville Railroad Company, within and without the State of Kentucky	$248,331,556.58

Deduct:

Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5.		14,787,788.01
		$233,543,768.57

Less:

Tangible properties within and without the State of Kentucky:

Within Kentucky, as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072 raised to 100% assuming assessed value to be 60% of real value)	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		178,927,902.15
Value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky		54,615,866.42
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky		24.6901%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 100%		13,484,712.03
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 60%		8,090,827.22

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by C. R.
Called Back 10/22/13.
Read by H. D.
Watched by C. R.

621 EXHIBIT GEO. W. LAMB NO. 8.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year 1912; *Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky, Arrived at by Deducting* (1) *the Value of Properties Separately Taxed in the State of Kentucky, as Arrived at on Capitalization of Net Income or Earnings Plan, and* (2) *the Value of Tangible Property, Both Within and Without the State of Kentucky, Wherever Situated; Also the Proportions of Such Franchise, or Intangible Values Assignable to the State of Kentucky on Basis of the Percentage that Mileage Operated, Owned, Leased or Controlled in the State of Kentucky, Bears to Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of 60% of its real value.*

6% Used in Capitalization of Income.

Total value of entire properties, tangible and intangible of the Louisville & Nashville Railroad Company, within and without the State of Kentucky		$270,019,179.17
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		16,079,254.83
		$253,939,924.34
Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky, as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072 raised to 100%, assuming assessed value to be 60% of real value)	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		178,927,902.15

Value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky	75,012,022.19
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 100%	$18,520,543.29
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 60%	11,112,325.97

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by H. D
Called Back 10/22/13.
Read by H. D.
Watched by C. R.

622 EXHIBIT GEO. W. LAMB NO. 9.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year 1912; *Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky, Arrived at by Deducting* (1) *The Value of Properties Separately Taxed in the State of Kentucky, as Arrived at on Capitalization of Net Income or Earnings Plan, and* (2) *the Value of Tangible Property, Both Within and Without the State of Kentucky, Wherever Situated; Also the Proportions of Such Franchise, or Intangible Values Assignable to the State of Kentucky on Basis of the Percentage that Mileage Operated, Owned, Leased or Controlled in the State of Kentucky, Bears to Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of* 60% *of its Real Value.*

8% Used in Capitalization of Income.

Total value of entire properties, tangible and intangible of the Louisville & Nashville Railroad Company, within and without the State of Kentucky		$202,514,384.38
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		12,059,441.12
		$190,454,943.26
Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky, as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072 raised to 100%, assuming assessed value to be 60% of real value)	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		178,927,902.15

Value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky	11,527,041.11
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 100%	$2,846,037.98
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 60%	1,707,622.79

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by H. D.
Called Back 10/22/13.
Read by H. D.
Watched by C. R.

623 EXHIBIT GEO. W. LAMB NO. 10.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Basis of Value of Stocks and Bonds, for the Fiscal Year Ended June 30, 1912; Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky, Arrived at by (1) Deducting the Value of Properties which are Separately Taxed in the State of Kentucky, (2) Bringing into Kentucky a Proportion of the Value of Entire Properties, Tangible and Intangible, Wherever Situated, of the Louisville & Nashville Railroad Company After Deducting the Value of Properties Separately Taxed on Basis of the Percentage that the Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of 60% of its Real Value, and (3) Deducting the Tangible Properties in the State of Kentucky as Assessed by the Auditor of Public Accounts in His Notice Dated June 28, 1913.

Total value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky	$227,035,292.84
Deduct:	
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5	30,761,799.35
	$196,273,493.49
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—100%	$48,460,121.82
Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—60%	29,076,073.09

Deduct:

Tangible properties in the State of Kentucky, as assessed by Auditor of Public Accounts, in his notice of June 28th, 1913	28,806,072.00
Kentucky's proportion of value of Louisville & Nashville Railroad Company's franchise, or intangible property	270,001.09

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. F. K.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/14, 1913.
Read by H. D.
Watched by C. R.

624 EXHIBIT GEO. W. LAMB NO. 11.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year Ended June 30th, 1912; Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky, Arrived at by (1) Deducting the Value of Properties which are Separately Taxed in the State of Kentucky, (2) Bringing into Kentucky a Proportion of the Value of Entire Properties, Tangible and Intangible, Wherever Situated, of the Louisville & Nashville Railroad Company After Deducting the Value of Properties Separately Taxed on Basis of the Percentage that the Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of 60% of its Real Value, and (3) Deducting the Tangible Properties in the State of Kentucky as Assessed by the Auditor of Public Accounts in His Notice Dated June 28th, 1913.

Composite Percentage of 6.524 Used in Capitalization of Income.

Total value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky	$248,331,556.58
Deduct:	
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5	14,787,788.01
	$233,543,768.57
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—100%	$57,662,190.01

Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—60%	34,597,314.01

Deduct:

Tangible properties in the State of Kentucky, as assessed by Auditor of Public Accounts, in his notice of June 28th, 1913	28,806,072.00
Kentucky's proportion of value of Louisville & Nashville Railroad Company's franchise, or intangible property	5,791,242.01

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. F. K.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/14, 1913.
Read by H. D.
Watched by C. R.

625 EXHIBIT GEO. W. LAMB NO. 12.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year Ended June 30th, 1912; Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky, Arrived at by (1) Deducting the Value of Projerties which are Separately Taxed in the State of Kentucky, (2) Bringing into Kentucky a Proportion of the Value of Entire Properties, Tangible and Intangible, Wherever Situated, of the Louisville & Nashville Railroad Company After Deducting the Value of Properties Separately Taxed on Basis of the Percentage that the Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of 60% of its Real Value, and (3) Deducting the Tangible Properties in the State of Kentucky as Assessed by the Auditor of Public Accounts in His Notice Dated June 28th, 1913.

Six Per Cent Used in Capitalization of Income.

Total value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky	$270,019,179.17
Deduct:	
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5	16,079,254.83
	$253,939,924.34
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—100%	$62,698,021.15

Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—60%	37,618,812.75
Deduct:	
Tangible properties in the State of Kentucky, as assessed by Auditor of Public Accounts, in his notice of June 28th, 1913.....	28,806,072.00
Kentucky's proportion of value of Louisville & Nashville Railroad Company's franchise, or intangible property	8,812,740.75

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. F. K.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/14, 1913.
Read by H. D.
Watched by C. R.

626 EXHIBIT GEO. W. LAMB NO. 13.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year Ended June 30th, 1912; Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky, Arrived at by (1) Deducting the Value of Properties which are Separately Taxed in the State of Kentucky, (2) Bringing into Kentucky a Proportion of the Value of Entire Properties, Tangible and Intangible Wherever Situated, of the Louisville & Nashville Railroad Company After Deducting the Value of Properties Separately Taxed on Basis of the Percentage that the Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of 60% of its Real Value, and (3) Deducting the Tangible Properties in the State of Kentucky as Assessed by the Auditor of Public Accounts in His Notice Dated June 28th, 1913.

Eight Per Cent Used in Capitalization of Income.

Total value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky	$202,514,384.38
Deduct:	
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5	12,059,441.12
	$190,454,943.26
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—100%	$47,023,515.96

Kentucky's proportion of value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, less value of properties separately taxed—60%	28,214,109.58

Deduct:

Tangible properties in the State of Kentucky, as assessed by Auditor of Public Accounts, in his notice of June 28th, 1913	28,806,072.00
Kentucky's proportion of value of Louisville & Nashville Railroad Company's franchise, or intangible property	*591,962.42

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. F. K.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/14, 1913.
Reached by H. D.
Watched by C. R.

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* Indicates negative quantity.

627 EXHIBIT GEO. W. LAMB #14.

Louisville and Nashville Railroad Company.

Statement Showing Values as of June 30th, 1912, Included in Total Value of Stocks and Bonds Which Are Not Included in Operated Mileage.

Clarksville & Princeton Branch (Leased)	$240,794.25
Paducah & Memphis Division (Leased)	4,130,376.03
Frankfort & Cincinnati Railway	376,356.08
Lewisburg & Northern Railroad	908,497.68
Real Estate, Timber and Quarry Lands	24,703.50
Donated Lands, Purchased from S. & N. A. R. R.	25,000.00
Leasehold in Wiggins Property, Cincinnati	50,000.00
Grant Hotel Property at Guthrie, Ky.	8,512.00
Property and Improvements at Cincinnati	726,286.11
Property at Memphis, Tenn	20,286.60
Real Estate at New Orleans, La.	36,211.74
Timber Lands for West Pascagoula Creosote Works	16,601.47
South & North Alabama Railroad	15,316,417.73
Nashville, Chattanooga & St. Louis Railway	6,662,525.25
Chicago, Indianapolis & Louisville Railway	6,008,533.62
Atlantic Compress Company	25,900.00
Augusta & Summerville Railroad	17,070.62
Augusta Belt Railway	32,275.67
Augusta Union Station Company	625.00
Atlanta & West Point Railroad Company	149,377.50
Cincinnati Inter-Terminal Railroad Company	140,500.00
Colossal Cavern Company	30,163.17
Elkton & Guthrie Railroad	25,175.00
Gulf Transit Company	10.00
Kentucky Public Elevator Company	37,439.50
Lexington Terminal Railroad of Georgia	3,300.00
Lexington & Eastern Railway Company	6,166,646.92
Louisville, Henderson & St. Louis Railway	519,788.73
Memphis Railroad Terminal Company	37,547.10
Missouri & Illinois Bridge & Belt Railroad Company	13,000.00
Milledgeville Railway	23,219.08
Monroe Railroad Company	46,746.47
Republic Iron & Steel Company	73,086.03
St. Louis & Tennessee River Packet Company	30,314.13
Tennessee River Packet Company	10.00
Buck Creek Cotton Mills	30,066.13
South Carolina & Augusta Railroad Company	860.08
Southern Iron & Steel Company	138,167.09
Charleston Terminal Company	276,800.00
Sloss Iron & Steel Company	34,400.00
Carrollton & Worthville Railroad Company	75,330.08
Jenifer Iron & Coal Company	22,300.00

H. I. Kimball House		2,630.94
Louisville Property Company		1,617,000.00
Louisville Property Company—Adjustment Account		154,097.75
Muhlenberg County, Kentucky		10,000.00
National Coal & Iron Company		58,000.00
State of Tennessee		300.00
Wholesale Merchants' Warehouse Company		398,000.00
Cairo & Thebes Railroad Company		1,689,642.15
Hallgarten & Company		60,000.00
Benedict & Warren Company		70,000.00
E. C. Ensign		76,217.36
Georgia Railroad, Advances	$1,346,043.37	
Georgia Railroad, Net Income, etc	316,764.79	
		1,662,808.16
L. & N. Lumber Company		270,000.00
Tuscaloosa Mineral Railroad		524,813.28
Paducah Property		33,826.75
Paducah & Illinois Railroad		3,589.38
New Orleans, Mobile and Chicago Railroad		383,765.92
Coal Lands, Mineral Rights, etc., State of Alabama		199,867.51
Total		$49,715,779.56

W.

[Endorsed:] Louisville & Nashville Railroad Co. Comptroller's Office. Statement. Prepared by J. P. Written by L. S. W. Footings Verified by C. R. Called Back 10/19/13. Read by H. D. Watched by C. R.

EXHIBIT GEO. W. LAMB #15.

Louisville and Nashville Railroad Company.

Statement Showing Par Value and Average Market Values of the Capital Stock and Outstanding Bonds of the Louisville and Nashville Railroad Company for the Fiscal Year Ended June 30, 1912.

	Par value.	Average market value per $100 of par value for year.	Total market value.
Stock:			
Louisville & Nashville Railroad Company, 600,000 Shares Common Stock	$60,000,000.00	152.0825	$91,249,500.00
Bonds:			
Evansville, Henderson & Nashville Division, 1st Mortgage Gold	1,080,000.00	104.7307	1,193,109.20
Pensacola Division, 1st Mortgage Gold	274,000.00	105.7500	289,755.00
Southeast and St. Louis Division, 1st Mortgage Gold	3,500,000.00	113.0000	3,955,000.00
Pensacola and Atlantic Railroad, 1st Mortgage Gold	1,873,000.00	110.7220	2,073,823.06
New Orleans and Mobile Division, 1st Mortgage Gold	4,993,000.00	119.2662	5,954,961.17
New Orleans and Mobile Division, 2nd Mortgage Gold	1,000,000.00	118.0190	1,180,190.00
General Mortgage Gold	4,689,000.00	114.8300	5,384,378.70
Henderson Bridge, 1st Mortgage Gold	1,126,000.00	106.0000	1,193,560.00
Louisville, Cincinnati & Lexington Railway, General Mortgage Gold	3,258,000.00	105.1960	3,427,285.68
First Mortgage 50-Year Gold	1,749,000.00	112.0570	1,959,876.93
Nashville, Florence and Sheffield Railway, 1st Mortgage Gold	1,996,000.00	108.8400	2,172,446.40
Unified 50-Year 4% Gold	57,871,000.00	99.0340	57,311,966.14
Newport and Cincinnati Bridge Company, General Mortgage Gold	1,400,000.00	.....	1,400,000.00
L. & N.—M. & M. Ry., 1st Mortgage Gold	4,000,000.00	103.4200	4,136,800.00
L. & N.—Paducah & Memphis Division, 1st Mortgage Gold	4,619,000.00	95.5140	4,411,791.66
Atlanta, Knoxville and Northern Railway, 1st Mortgage Gold	999,000.00	112.1419	1,120,297.58
Atlanta, Knoxville and Cincinnati Division, Gold	20,245,000.00	92.6830	18,763,673.35
Southeast and St. Louis Division, 2d Mortgage Gold	2,998,000.00	70.8430	2,123,873.14

Kentucky Central Railway, 1st Mortgage Gold	6,704,000.00	94.3620	6,326,028.48
Atlanta, Knoxville and Northern Railway, 1st Consolidated Mortgage Gold	500,000.00	.....	500,000.00
St. Louis Property, 20-Year 1st Mortgage Gold	617,000.00	.....	617,000.00
First Mortgage Trust Gold	4,705,000.00	109.3210	5,143,553.05
L. & N., Southern, Monon Collateral Joint Gold—L. & N. Proportion	5,882,500.00	87.4870	5,146,423.30
Total Bonds	$136,078,500.00		$135,785,792.84

Recapitulation.

Total Stocks	$60,000,000.00	$91,249,500.00
Total Bonds	136,078,500.00	135,785,792.84
Total Stocks and Bonds	$196,078,500.00	$227,035,292.84
Less: Values as of June 30th, 1912, included in total value of Stocks and Bonds which are not included in operated mileage		49,715,779.56
Total value of Stocks and Bonds included in operated mileage		177,319,513.28

NOTE.—In the case of Bonds for which no quotations are available, the par value is shown as average market value.

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.
Statement.
Prepared by W. K.
Written by L. S. W.
Footings Verified by H. D.
Called back 9/15/13.
Read by H. D.
Watched by C. R.

629 EXHIBIT GEO. W. LAMB No. 16.

Louisville and Nashville Railroad Company.

Statement Showing Total Mileage Operated, Owned, Leased or Controlled, Both Within and Without the State of Kentucky; Also Mileage Operated, Owned, Leased or Controlled, Using Mileage of Roads Not Wholly Operated, Owned, Leased or Controlled, Based on the Percentage of Ownership, or Use, Both Within and Without the State of Kentucky.

	Total mileage operated, owned, leased or controlled within and without the State of Kentucky.	Mileage operated, owned, leased or controlled, using mileage of roads not wholly operated, owned, leased or controlled, based on percentage of ownership, or use.		
		Total mileage within and without Kentucky.	Total mileage in Kentucky.	Total mileage outside Kentucky.
Owned and Operated	3,498.63	3,432.35	1,151.16	2,281.19
Operated as Owner of Entire Capital Stk.	632.05	632.05	334.33	297.72
Operated Under Lease	118.97	66.27	.....	66.27
Operated Under Trackage Arrangement	217.04	213.02	16.09	196.93
Owned, Leased, Operated Under Trackage Arrangement	5.46	5.46	.....	5.46
Owner of Entire Capital Stock, Property Operated Separately, Operated by this Company Under Trackage Arrangement	6.46	6.46	6.46	.....

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Operated for Account of Owners	221.88	201.77	21.42	180.35
Operated Under Separate Organizations	2,937.89	1,568.39	211.55	1,356.84
Owned but Operated by Other Companies	269.45	269.45	70.11	199.34
Total	7,907.83	6,395.22	1,811.12	4,584.10

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by C. R.
Written by L. W.
Footings Verified by H. D.
Called Back 11/15/13.
Read by H. D.
Watched by C. R.

BOUND IN BOOK

630 EXHIBIT GEO. W. LAMB NO. 17.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Basis of Stocks and Bonds Plan, for the Fiscal Year 1912; *Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky Arrived at by Deducting* (1) *the Value of Properties Separately Taxed in the State of Kentucky, and* (2) *the Value of Tangible Property, Both Within and Without the State of Kentucky, Wherever Situated; Also the Proportions of Such Franchise, or Intangible Values Assignable to the State of Kentucky on Basis of the Percentage Which Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled Within and Without the State of Kentucky, Using Mileage for Roads Not Wholly Operated, Owned, Leased or Controlled, Based on the Percentage of Ownership or Use, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of* 60% *of its Real Value.*

Total values of entire properties, tangible and intangible, of the Louisville and Nashville Railroad Company, within and without the State of Kentucky		$227,035,292.84
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		30,761,799.35
		$196,273,493.49
Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky, as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072, raised to 100%, assuming assessed value to be 60% of real value	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		178,927,902.15

Value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky	17,345,591.34
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky, using mileage of roads not wholly operated, owned, leased or controlled based on the percentage of ownership, or use	28.320%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property at 100%	$4,912,271.47
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property at 60%	2,947,362.88

W.

Comptroller's Office.

Statement.

Prepared by J. P.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/15, 1913.
Read by W. R. P.
Watched by H. D.

631 EXHIBIT GEO. W. LAMB NO. 18.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Eentire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year 1912; *Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky Arrived at by Deducting* (1) *the Value of Properties Separately Taxed in the State of Kentucky, as Arrived at on Capitalization of Net Income or Earnings Plan, and* (2) *the Value of Tangible Property, Both Within and Without the State of Kentucky, Wherever Situated; Also the Proportions of Such Franchise, or Intangible Values Assignable to the State of Kentucky on Basis of the Percentage Which Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled Within and Without the State of Kentucky, Using Mileage for Roads Not Wholly Operated, Owned, Leased or Controlled, Based on the Percentage of Ownership or Use, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of* 60% *of its Real Value.*

Composite Percentage of 6.524% Used in Capitalization of Income.

Total value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky		$248,331,556.58
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		14,787,788.01
		$233,543,768.57
Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky, as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072, raised to 100%, assuming assessed value to be 60% of real value)	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		178,927,902.15

Value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky	54,615,866.42
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky, using mileage for roads not wholly operated, owned, leased or controlled based on the percentage of ownership, or use	28.320%
or use	28.320%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 100%	$15,467,213.37
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, at 60%	9,280,328.02

W.

Prepared by W. K.
Written by L. S. W.
Footings Verified by C. R.
Called Back 10/22/13.
Read by H. D.
Watched by C. R.

632 EXHIBIT GEO. W. LAMB NO. 19.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year 1912; *Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky Arrived at by Deducting* (1) *the Value of Properties Separately Taxed in the State of Kentucky, as Arrived at on Capitalization of Net Income or Earnings Plan, and* (2) *the Value of Tangible Property, Both Within and Without the State of Kentucky, Wherever Situated; Also the Proportions of Such Franchise, or Intangible Values Assignable to the State of Kentucky on Basis of the Percentage which Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled Within and Without the State of Kentucky, Using Mileage for Roads Not Wholly Operated, Owned, Leased or Controlled, Based on the Percentage of Ownership or Use, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of* 60% *of its Real Value.*

Six Per Cent Used in Capitalization of Income.

Total values of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky		$270,019,179.17
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		16,079,254.83
		$253,939,924.34
Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky, as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072, raised to 100%, assuming assessed value to be 60% of real value)	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		178,927,902.15

Value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky	75,012,022.19
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky, using mileage of roads not wholly operated, owned, leased or controlled based on the percentage of ownership, or use	28.320%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property at 100%	$21,243,404.68
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property at 60%	12,746,042.81

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by J. P.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/15, 1913.
Read by W. R. P.
Watched by H. D.

633 EXHIBIT GEO. W. LAMB No. 20.

Louisville and Nashville Railroad Company.

Statement Showing the Amounts of the Entire Values of the Properties of the Louisville & Nashville Railroad Company, Tangible and Intangible, Both Within and Without the State of Kentucky, as Arrived at on the Capitalization of Income or Earnings Plan, for the Fiscal Year 1912; *Also the Value of Franchise, or Intangible Property Apportionable to the State of Kentucky Arrived at by Deducting* (1) *the Value of Properties Separately Taxed in the State of Kentucky, as Arrived at on Capitalization of Net Income or Earnings Plan, and* (2) *the Value of Tangible Property, Both Within and Without the State of Kentucky, Wherever Situated; Also the Proportions of Such Franchise, or Intangible Values Assignable to the State of Kentucky on Basis of the Percentage which Mileage Operated, Owned, Leased or Controlled in the State of Kentucky Bears to the Total Mileage Operated, Owned, Leased or Controlled Within and Without the State of Kentucky, Using Mileage for Roads Not Wholly Operated, Owned, Leased, or Controlled, Based on the Percentage of Ownership or Use, Assuming that the Rule and Custom in the Assessment of Property for Taxation in the State of Kentucky is on an Average at a Rate of* 60% *of its Real Value.*

Eight Per Cent. Used in Capitalization of Income.

Total values of entire properties, tangible and intangible, of the Louisville and Nashville Railroad Company, within and without the State of Kentucky		$202,514,384.38
Deduct:		
Value of properties which are separately taxed in the State of Kentucky, as per Exhibit Geo. W. Lamb No. 5		12,059,441.12
		$190,454,943.26
Less:		
Tangible properties within and without the State of Kentucky:		
Within Kentucky, as assessed by Auditor of Public Accounts in his notice of June 28, 1913 ($28,806,072, raised to 100%, assuming assessed value to be 60% of real value	$48,010,120.00	
Without Kentucky (Exhibit Geo. W. Lamb No. 3)	130,917,782.15	
		178,927,902.15

Value of Louisville & Nashville Railroad Co.'s franchise, or intangible property, excluding values which are separately taxed in the State of Kentucky	11,527,041.11
Percentage which mileage operated, owned, leased or controlled in the State of Kentucky, bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky, using mileage of roads not wholly operated, owned, leased or controlled based on the percentage of ownership, or use	28.320%
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property at 100%	$3,264,458.04
Kentucky's proportion of value of Louisville & Nashville Railroad Co.'s franchise, or intangible property at 60%	1,958,674.82

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by J. P.
Written by L. S. W.
Footings Verified by H. D.
Called Back 11/15, 1913.
Read by W. R. P.
Watched by H. D.

Louisville and Nashville Railroad Company.

Statement Showing Amount of Taxes Paid in the State of Kentucky by the Louisville & Nashville Railroad Company, Operated Mileage in Kentucky, and Taxes Paid Per Mile of Road Operated for Each of the Fiscal Years Ended June 30, 1890 to 1912, Inclusive.

Year.	Total taxes paid by L. & N. R. R. Co. and affiliated or controlled companies in the State of Kentucky.	Less Colossal Cavern Co., E. & G. Ry. Co., and F. & C. Ry. Co. taxes.	Total taxes paid by L. & N. R. R. in State of Kentucky.	Mileage operated in Kentucky, excluding E. & G. Ry., F. & C. Ry., Glasgow Ry.	Taxes paid for mile of road operated in Kentucky.
1889–90	$141,422.16	.....	$141,422.16	$830.90	$170.20
1890–91	144,939.06	.....	144,939.06	1,179.33	122.90
1891–92	167,002.21	$97.75	166,904.46	1,179.33	141.52
1892–93	206,547.86	258.70	206,289.16	1,191.21	173.18
1893–94	216,433.81	692.90	215,740.91	1,192.08	180.98
1894–1895	193,452.06	270.11	193,181.95	1,192.08	162.05
1895–96	198,269.19	314.19	197,955.00	1,164.70	169.96
1896–97	203,017.53	307.40	202,710.13	1,171.02	173.11
1897–98	236,125.52	397.06	235,728.46	1,171.02	201.30
1898–99	269,798.82	490.08	269,308.74	1,171.93	229.80
1899–00	261,352.13	440.59	260,911.54	1,171.93	222.63
1900–01	281,187.82	392.35	280,795.47	1,170.92	239.81
1901–02	272,358.42	413.75	271,944.67	1,217.15	223.43
1902–03	491,766.97	394.77	491,372.20	1,230.62	399.29
1903–04	418,090.18	960.63	417,129.55	1,240.78	336.18

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1904–05	537,540.78	2,169.36	535,371.42	1,243.81	430.43
1905–06	425,691.89	443.35	425,248.54	1,246.55	341.14
1906–07	477,238.35	994.56	476,243.79	1,290.29	369.10
1907–08	473,234.20	1,379.87	471,854.33	1,288.55	366.19
1908–09	482,152.30	1,206.62	480,945.68	1,316.15	365.42
1909–10	489,704.74	4,294.43	485,410.31	1,466.45	331.01
1910–1911	673,750.64	5,280.81	668,469.83	1,494.36	447.32
1911–12	501,199.22	5,854.23	495,344.99	1,574.47	314.61
Total	$7,762,275.86	$27,053.51	$7,735,222.35		
1912–13* Total estimated			$919,600.00		$642.00

* Does not include companies making separate reports.

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by C. R.
Called Back 10/8/13.
Read by H. D.
Watched by C. R.

EXHIBIT GEO. W. LAMB No. 22.

Louisville and Nashville Railroad Company.

Statement of Taxes Paid in the State of Kentucky for Each of the Calendar Years 1907 to 1912, Inclusive, and Estimated Franchise Taxes for the year 1913, Separated as Between Tangible and Franchise Taxes. Also Showing Mileage Operated and Taxes Per Mile of Operated Mileage.

Assessment for year.	Tangible taxes.	Franchise taxes.	Total taxes.	Operated mileage.	Tangible taxes per mile of operated mileage.	Franchise taxes per mile of operated mileage.	Total taxes per mile of operated mileage.
1907.....	$377,855.51	$117,658.75	$495,514.26	1,290.29	$292.85	$91.19	$384.04
1908.....	376,295.85	97,258.02	473,553.87	1,288.55	292.03	75.48	367.51
1909.....	412,381.57	107,259.36	519,640.93	1,316.15	313.32	81.49	394.81
1910.....	430,237.65	117,707.10	547,944.75	1,466.55	293.37	80.26	373.63
1911.....	468,383.45	149,589.17	617,972.62	1,494.36	313.43	100.10	413.53
1912.....	434,094.01	142,538.91	576,632.92	1,574.47	275.71	90.53	366.24
1913..... (Estimated.)	.....	584,798.84	.....	1,574.47	.....	371.43	.....

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by C. R.
Called Back, 10/8/13.
Read by H. D.
Watched by C. R.

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EXHIBIT GEO. W. LAMB No. 23.

Louisville and Nashville Railroad Company.

Statement Showing Comparison of Taxes Paid Per Mile by the Louisville and Nashville Railroad Company in Kentucky, with Taxes Paid by Other Carriers in Southern Classification Territory, for the Fiscal Years Ended June 30, 1910 & 1911.

	Southern Classification Territory. (11 Carriers).	
	1911.	1910.
Average number of miles of road operated	33,308.66	33,044.28
Taxes Accrued	$12,692,544	$11,426,468
Taxes per mile	381.05	345.79

Reference: Twenty-fifth Annual Report of the Interstate Commerce Commission, page 68.

	1911.	1912.	1913.
Total Assessment of L. & N. R. R. in Kentucky	$41,069,577.00	$41,417,422.00	$76,000,000.00—Proposed
Total taxes paid by L. &N. R. R. Co. in Kentucky	673,750.64	501,199.22	919,600.00—Estimated
Total operated mileage of L. & N. R. R. Co. in Kentucky	1,487.40	1,574.47	1,432.35
Taxes paid per mile	452.97	314.61	640.02—Estimated
Tax rate on each $100 of Assessment	$1.641	$1.210	$1.210—Estimated

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. R. Written by L. S W. Footings Verified by ——— ———. Called back 10/10/13. Read by H. D. Watched by C. R.

EXHIBIT GEO. W. LAMB No. 24.

Louisville and Nashville Railroad Company.

Comparison of Taxes Paid Per Mile of Road by All Steam Roads in the United States with Taxes Paid by the Louisville & Nashville Railroad Company in the State of Kentucky.

	Year ended June 30th.		Average per mile of road operated.	
	1911.	1910.	1911.	1910.
Average Number of Miles of road operated.....	243,229.38	239,483.49		
Taxes	$109,108,490.26	104,821,374.70	448.58	437.70

Reference: Twenty-fifth Annual Report of the Interstate Commerce Commission, page 70.

	1911.	1912.	1913.	
Total Assessment of L. & N. R. R. in Kentucky..	$41,069,577.00	$41,417,442.00	$76,000,000.00	—Proposed
Total taxes paid by L. & N. R. R. Co. in Kentucky	673,750.64	501,199.22	919,600.00	—Estimated
Tax Rate (Adverage) on each $100.....	1.641	1.210	1.210	—Estimated
Mileage operated in Kentucky.....	1,487.40	1,574.47	1,432.35	
Taxes paid by L. & N. R. R. Company per mile..	452.97	314.61	642.02	—Estimated

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Stattement.

Prepared by W. K. Written by L. S. W. Footings Verified by —— ——. Called Back 10/10/13. Read by H. D. Watched by C. R.

(Here follows Exhibit Geo. W. Lamb No. 25, marked page 637.)

Statement Showing True and Assessed Valuation

	1890.		
	True Value.	Assessed Value.	Percentage.
United States	$65,037,091,197	25,473,173,418	39.16
Kentucky	1,172,232,313	547,596,788	46.71
Ohio	3,951,382,384	1,778,138,477	45.00
Indiana	2,095,176,626	856,838,472	40.90
Illinois	5,066,751,719	809,682,926	15.98
Missouri	2,397,902,945	887,975,928	37.03
Tennessee	887,956,143	382,760,191	43.11
Virginia	862,318,070	415,249,107	48.15
Pennsylvania	6,190,746,550	2,659,796,909	42.96

W.

EXHIBIT GEO. W. LAMB No. 25.

Louisville and Nashville Railroad Company.

...eal and Personal Property Taxed, for the Years 1850, 1860, 1870, 1880, *and* 1890, *as Shown by the* 1890 *Report of the United States Census, Pages* 14 *and* 59.

1880.			1870.			1860.			1850.		
True Value.	Assessed Value.	Percentage.	True Value.	Assessed Value.	Percentage.	True Value.	Assessed Value.	Percentage.	True Value.	Assessed Value.	Percentage.
43,642,000,000	17,139,903,495	39.27	30,068,518,507	14,178,986,732	47.15	16,159,616,068	12,084,560,005	74.78	7,135,780,228	6,024,666,909	85.84
902,000,000	370,743,384	41.10	604,318,552	409,544,294	67.77	666,043,112	528,212,693	79.30	301,628,456	291,387,554	96.60
3,238,000,000	1,534,360,508	47.38	2,234,430,300	1,167,731,697	52.26	1,193,898,422	950,867,101	79.64	504,726,120	433,872,632	85.96
1,681,000,000	727,815,131	43.29	1,268,180,543	663,455,044	52.31	528,835,371	411,042,424	77.72	202,650,264	152,870,399	75.33
3,210,006,000	786,616,394	24.50	2,121,680,579	482,899,575	22.76	871,860,282	389,207,372	44.64	156,265,006	114,782,645	73.47
1,562,000,000	561,939,771	35.97	1,284,922,897	556,129,969	43.28	501,214,398	266,935,851	53.25	137,247,707	98,595,463	71.83
705,000,000	228,154,432	32.36	498,237,724	253,782,161	50.93	493,903,892	382,495,200	77.44	201,246,686	195,281,358	97.03
707,000,000	318,331,441	45.02	409,588,133	365,439,917	89.22	793,249,681	657,021,336	82.82	430,701,082	382,304,253	88.76
4,942,000,000	1,683,459,016	34.06	3,808,340,112	1,313,236,042	34.48	1,416,501,818	719,253,335	50.77	722,846,120	500,275,851	69.20

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by, Copied from Ex. H. F. T. No. 37.
Written by L. S. W.
Footings Verified by ——.
Called Back, 9/10/13.
Read by H. D.
Watched by C. R.

EXHIBIT GEO. W. LAMB No. 26.

Louisville and Nashville Railroad Company.

Estimated True Value of All Property Compared with the Assessed Valuation of All Property Subject to Ad Valorem Taxation, by States. Railroads, Street Railways, Telegraph and Telephone Systems, Privately Owned Waterworks, and Privately Owned Central Electric Light and Power Stations, which, in Certain States are Classed as Real Property, are Included in This Table as "Personal and Other Property."

	1900.			1904.		
	Estimated true-value.	Assessed value.	Ratio.	Estimated true-value.	Assessed value.	Ratio.
Kentucky	$1,365,130,718	$650,661,431	47.7	$1,527,486,230	$700,881,240	45.9
Ohio	5,019,004,453	1,834,053,228	36.5	5,946,969,466	2,113,806,168	35.5
Indiana	2,606,493,004	1,360,445,139	52.2	3,105,781,739	1,532,896,640	49.4
Illinois	6,976,476,400	809,733,405	11.6	8,816,556,191	1,087,844,331	12.3
Missouri	3,244,532,987	1,190,857,753	36.7	3,759,597,451	1,380,246,430	36.7
Tennessee	956,672,000	396,789,350	41.5	1,104,223,979	428,715,337	38.8
Virginia	1,102,309,696	484,708,332	44.0	1,287,970,180	537,032,099	41.7
Pennsylvania	9,315,140,116	2,933,194,386	31.5	11,473,620,306	3,676,796,517	32.0

Reference: Tables 15 and 16 Special Report, "Wealth, Debt and Taxation"—Census Bureau 1907.

W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by W. K.
Written by L. S. W.
Footings Verified by —— ——.
Called Back 10/10/13.
Read by H. D.
Watched by C. R.

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EXHIBIT GEO. W. LAMB NO. 27.

Louisville and Nashville Railroad Company.

Ratio of Assessed Valuation to Estimated True Value of Real and Personal Property Taxed in Various States, as Below, Including Railroads, Street Railways, Telegraph and Telephone Systems, Privately Owned Waterworks, and Privately Owned Central Electric Light and Power Stations.

	1904.	1900.	1890.	1880.	1870.	1860.	1850.
Continental U. S.	36.4	35.3	39.16	39.27	47.15	74.78	85.84
Kentucky	45.9	47.7	46.71	41.10	67.77	79.30	96.60
Ohio	35.5	36.5	45.00	47.38	52.26	79.64	85.96
Indiana	49.4	52.2	40.90	43.29	52.31	77.72	75.33
Illinois	12.3	11.6	15.98	24.50	22.76	44.64	73.47
Missouri	36.7	36.7	37.03	35.97	43.28	53.25	71.83
Tennessee	38.8	41.5	43.11	32.36	50.93	77.44	97.03
Virginia	41.7	44.0	48.15	45.02	89.22	82.82	88.76
Pennsylvania	32.0	31.5	42.96	34.06	34.48	50.77	69.20

Reference: Pages 40 and 41, Special Report "Wealth, Debt and Taxation," Census Bureau 1900. Pages 14 and 59, Special Report "Wealth, Debt and Taxation," Cenusus Bureau 1890.
W.

LOUISVILLE & NASHVILLE RAILROAD CO.

Comptroller's Office.

Statement.

Prepared by Copied from Exhibit H. F. T. #37B.
Written by L. S. W.
Footings Verified by C. R.
Called Back 10/8/13.
Read by H. D.
Watched by C. R.

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EXHIBIT GEO. W. LAMB NO. 28.

Louisville and Nashville Railroad Company.

Statement Showing Total Mileage of Roads Operated as of June 30, 1912, Divided as Between Mileage in the State of Kentucky and Mileage Outside of State of Kentucky, Excluding Mileage Operated for Account of Owners and Mileage Separately Taxed in the State of Kentucky.

Lines Owned and Operated.	Total.	In Kentucky.	Outside of Kentucky.
Main Stem	185.80	139.91	45.89
Chesapeake and Nashville Branch	46.82	10.08	36.74
Nashville, Florence and Sheffield Division	107.56	.....	107.56
Montgomery and Prattville Branch	10.36	.....	10.36
Birmingham Mineral Division	248.84	.....	248.84
Alabama Mineral Division	131.16	.....	131.16
Mobile & Montgomery Division	177.67	.....	177.67
Alabama & Florida Division	126.66	.....	126.66
New Orleans & Mobile Division	141.17	.....	141.17
Bardstown & Springfield Branch	37.44	37.44	.....
Lebanon Branch	107.28	107.28	.....
Greensburg Branch	30.85	30.85	.....
Knoxville Division	242.80	47.08	195.72
Atlanta Division—New Line	89.38	.....	89.38
Atlanta Division—Old Line	166.18	.....	166.18
Cumberland Valley Division	144.48	72.17	72.31
Middlesboro Railroad	17.12	14.15	2.97
Memphis Line	261.59	46.46	215.13
Clarksville & Princeton Branch	32.00	23.17	8.83

	Total.	In Kentucky.	Outside of Kentucky.
Clarksville Mineral Branch	36.90	.....	36.90
Henderson Division	158.45	110.49	47.96
Morganfield Branch (part of)	16.10	16.10	.....
Southern Alabama Division	127.64	.....	127.64
Myrtlewood Branch	60.25	.....	60.25
Yellow River Branch	26.40	.....	26.40
Pensacola Division	44.64	.....	44.64
Pensacola & Atlantic Division	160.47	.....	160.47
Cincinnati Division	118.36	118.00	.36
Lexington Branch	75.51	75.51	.....
Shelby Branch	18.58	18.58	.....
Kentucky Division	220.39	220.39	.....
Louisville & Atlantic Division	103.06	103.06	.....
Bloomfield Branch	26.72	26.72	.....
Total lines owned and operated	3,498.63	1,217.44	2,281.19
Lines Operated But Not Owned.			
Operated as Owner of Entire Capital Stock:			
Southeast & St. Louis Railway	207.70	.....	207.70
Morganfield & Atlanta Railroad	25.33	25.33	.....
Madisonville, Hartford & Eastern Railroad	55.49	55.49	.....
Maysville & Lexington Rd.—Northern Division	49.48	49.48	.....
Maysville & Lexington Rd.—Southern Division	17.86	17.86	.....
Owensboro & Nashville Railway	83.46	83.46	.....
Bay Minette & Ft. Morgan Railroad	36.52	.....	36.52
Long Branch Coal Railroad	7.99	.....	7.99

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Stout's Mountain Railroad	5.91	.....	5.91
Pontchartrain Railroad	4.96	.....	4.96
Pine Mountain Railroad—West	21.09	21.09	.....
Pine Mountain Railroad—East	2.15	2.15	.....
Kentucky Highlands Rd.—Millville to Versailles	9.42	9.42	.....
Swan Creek Railway	17.10	.....	17.10
Wasioto & Black Mountain Railroad	70.05	70.05	.....
Harriman, Knoxville & Eastern Railroad	17.54	.....	17.54
Total operated as owner of entire capital stock	632.05	334.33	297.72
Operated under lease:			
Nashville and Decatur Railroad	118.97	.....	118.97

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by J. L. P.
Written by L. S. W.
Footings Verified by J. L. P.
Called Back 11/19/13.
Read by J. L. P.
Watched by L. S. W.

EXHIBIT GEO. W. LAMB No. 28.

Lines Operated But Not Owned—Continued.	Total.	In Kentucky.	Outside of Kentucky.
Operated Under Trackage Arrangements:			
Main Stem—2d Division, L. & N. Terminal Co. Tracks	.59	.....	.59
Nashville & Decatur Railroad:			
L. & N. Terminal Company Tracks	.48	.....	.48
M. & C. Junction to Decatur (Southern Railway)	1.71	.....	1.71
Nashville, Florence & Sheffield Division:			
Furnace Jct. to Sheffield Jct., Ala. (Southern Ry.)	2.90	.....	2.90
Birmingham Mineral Division:			
Gurnee Jct. to Blocton, Ala. (Southern Railway)	14.30	.....	14.30
Aden to Masena, Ala. " "	5.60	.....	5.60
Seymour, Ala., to End of Track " "	3.91	.....	3.91
Ardola to Hansell, Ala. " "	2.90	.....	2.90
Blocton Jct., to Blocton, Ala. (W. & B. Railway)	7.73	.....	7.73
Alabama Mineral Division:			
Morange to Attalla, Ala. (N. C. & St. L. Railway)	2.01	.....	2.01
Track to Gadsden, Ala. " "	.74	.....	.74
Knoxville Division:			
Hyde to Fonde, Ky. (Southern Railway)	11.21	2.09	9.12

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Atlanta Division—New Line:			
Junta to Atlanta, Ga. (N. C. & St. L. Railway)	48.09	.....	48.09
Cumberland Valley Division:			
Virginia & Southwestern Tracks	15.65	.....	15.65
Norfolk & Western Tracks at Norton, Va	.77	.....	.77
Straight Creek Coal & Coke Company's Track	3.89	3.89	.....
Atlanta & Birmingham Air Line Railway	77.40	.....	77.40
Morganfield Branch:			
Providence Coal Company's Track	.30	.30	.....
Southern Alabama Division:			
Western Railway of Alabama Track at Selma	.51	.....	.51
Myrtlewood Branch:			
Western Railway of Alabama Track at Selma	.36	.....	.36
Pensacola & Atlantic Division:			
A. C. L. Ry. Track at River Junction	1.04	.....	1.04
Cincinnati Division:			
P. C. C. & St. L. Ry. Track at Cincinnati, O.	.44	.....	.44
Louisville & Interurban Railway Track	7.70	7.70	.....
Lexington Branch:			
C. & O. Track at Lexington	.20	.20	.....
Lexington Union Station Company Track	.22	.22	.....

	Total.	In Kentucky.	Outside of Kentucky.
Kentucky Division:			
C. & C. Bridge Track	2.18	1.58	.60
St. Louis Division:			
B. & O. Ry. Track at East St. Louis, Ill	.11	.....	.11
Terminal Railroad Association of St. Louis Tracks	3.84	.....	3.84
Owensboro & Nashville Railway:			
Track at Owensboro, Ky. (L. H. & St. L. Railway)	.26	.26	.....
Total operated under trackage arrangements	217.04	16.24	200.80

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by Copied from original.
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Called Back 11/19/13.
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Watched by L. S. W.

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	Total.	In Kentucky.	Outside of Kentucky.
Lines Operated for Account of Owners.			
Elkton & Guthrie Railroad	10.92	10.92	.....
Glasgow Railway	10.50	10.50	.....
South & North Alabama Railroad	200.46	.....	200.46
Line Owned—Leased to N., C. & St. L. Ry., Operated under Trackage Arrangement.			
Memphis Line—Aulon to South Memphis	5.46	.....	5.46
Line Operated under Trackage Arrangement, Entire Capital Stock Owned—Property Operated under Its Own Organization.			
Louisville & Atlantic Division:			
Kentucky Highlands Railroad—Millville to Cliffside	6.46	6.46	.....
Resume.			
Owned and Operated	3,498.63	1,217.44	2,281.19
Operated as Owner of Entire Capital Stock	632.05	334.33	297.72
Operated Under Lease	118.97	.....	118.97
Operated Under Trackage Arrangement	217.04	16.24	200.80
Owned, Leased, Operated Under Trackage Arrangement	5.46	.....	5.46
Owner of Entire Capital Stock, Property Operated Separately, Operated by this Company under Trackage Arrangement	6.46	6.46	.....

	Total.	In Kentucky.	Outside of Kentucky.
Operated for Account of Owners	221.88	21.42	200.46
Total mileage operated	4,700.49	1,595.89	3,104.60
Deduct: Operated for Account of Owners	221.88	21.42	200.46
	4,478.61	1,574.47	2,904.14
Deduct Mileage of Roads separately taxed in the State of Kentucky:			
Morganfield & Atlanta Railroad 25.33			
Madisonville, Hartford & Eastern R. R. 55.49			
Wasioto & Black Mountain Railroad 70.05			
Kentucky Highlands Railroad—Millville to Versailles 9.42			
Kentucky Highlands Railroad—Millville to Cliffside **6.46**			
	166.75	166.75	.....
Total mileage operated less mileage of Roads separately taxed in Kentucky	4,311.86	1,407.72	2,904.14

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.
Prepared by Copied from Original.
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EXHIBIT GEO. W. LAMB No. 29.

Louisville and Nashville Railroad Company.

Statement Showing Total Mileage of Roads Operated, Owned, Leased or Controlled, as of June 30, 1912, Divided as Between Mileage in State of Kentucky and Mileage Outside of State of Kentucky.

Lines Owned and Operated.	Total.	In Kentucky.	Outside of Kentucky.
Owned:			
Main Stem	185.80	139.91	45.89
Chesapeake and Nashville Branch	46.82	10.08	36.74
Nashville, Florence and Sheffield Division	107.56	.....	107.56
Montgomery and Prattville Branch	10.36	.....	10.36
Birmingham Mineral Division	248.84	.....	248.84
Alabama Mineral Division	131.16	.....	131.16
Mobile & Montgomery Division	177.67	.....	177.67
Alabama & Florida Division	126.66	.....	126.66
New Orleans & Mobile Division	141.17	.....	141.17
Bardstown & Springfield Branch	37.44	37.44	.....
Lebanon Branch	107.28	107.28	.....
Greensburg Branch	30.85	30.85	.....
Knoxville Division	242.80	47.08	195.72
Atlanta Division—New Line	89.38	.....	89.38
Atlanta Division—Old Line	166.18	.....	166.18
Cumberland Valley Division	144.48	72.17	72.31
Middlesboro Railroad	17.12	14.15	2.97
Memphis Line	261.59	46.46	215.13
Clarksville & Princeton Branch	32.00	23.17	8.83
Clarksville Mineral Branch	36.90	.....	36.90

	Total.	In Kentucky.	Outside of Kentucky.
Henderson Division	158.45	110.49	47.96
Morganfield Branch (part of)	16.10	16.10	.....
Southern Alabama Division	127.64	.....	127.64
Myrtlewood Branch	60.25	.....	60.25
Yellow River Branch	26.40	.....	26.40
Pensacola Division	44.64	.....	44.64
Pensacola & Atlantic Division	160.47	.....	160.47
Cincinnati Division	118.36	118.00	.36
Lexington Division	75.51	75.51	.....
Shelby Branch	18.58	18.58	.....
Kentucky Division	220.39	220.39	.....
Louisville & Atlantic Division	103.06	103.06	.....
Bloomfield Branch	26.72	26.72	.....
Total lines owned	3,498.63	1,217.44	2,281.19
Lines Operated But Not Owned.			
Operated as Owner of Entire Capital Stock:			
Southeast & St. Louis Railway	207.70	.....	207.70
Morganfield & Atlanta Railroad	25.33	25.33	.....
Madisonville, Hartford & Eastern Railroad	55.49	55.49	.....
Maysville & Lexington Rd.—Northern Division	49.48	49.48	.....
Maysville & Lexington Rd.—Southern Division	83.46	83.46	.....
Owensboro & Nashville Railway	17.86	17.86	.....
Bay Minette & Ft. Morgan Railroad	36.52	.....	36.52
Long Branch Coal Railroad	7.99	.....	7.99
Stout's Mountain Railroad	5.91	.....	5.91

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Pontchartrain Railroad	4.96	.....	4.96
Pine Mountain Railroad—West	21.09	21.09	.....
Pine Mountain Railroad—East	2.15	2.15	.....
Kentucky Highlands Rd.—Millville to Versailles	9.42	9.42	.....
Swan Creek Railway	17.10	.....	17.10
Wasioto & Black Mountain Railroad	70.05	70.05	.....
Harriman, Knoxville & Eastern Railroad	17.54	.....	17.54
Total operated as owner of entire capital stock	632.05	334.33	297.72
Operated under lease:			
Nashville and Decatur Railroad	118.97	.....	118.97

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by Copied.
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Called Back 1/20/14.
Read by C. R.
Watched by H. D.

EXHIBIT GEO. W. LAMB NO. 29.

Lines Operated But Not Owned—Continued.	Total.	In Kentucky.	Outside of Kentucky.
Operated Under Trackage Arrangements:			
Main Stem—2d Division, L. & N. Terminal Co. Tracks	.59	.....	.59
Nashville & Decatur Railroad:			
L. & N. Terminal Company Tracks	.48	.....	.48
M. & C. Junction to Decatur (Southern Railway)	1.71	.....	1.71
Nashville, Florence & Sheffield Division:			
Furnace Jct. to Sheffield Jct., Ala. (Sou. Ry.)	2.90	.....	2.90
Birmingham Mineral Division:			
Gurnee, Jct. to Blocton, Ala. (Southern Ry.)	14.30	.....	14.30
Aden to Masena, Ala. (Southern Railway)	5.60	.....	5.60
Seymour, Ala., to End of Track (Southern Ry.)	3.91	.....	3.91
Ardola to Hansell, Ala. (Southern Railway)	2.90	.....	2.90
Blocton Jct. to Blocton, Ala. (W. & B. Ry.)	7.73	.....	7.73
Alabama Mineral Division:			
Morange to Attalla, Ala. (N. C. & St. L. Ry.)	2.01	.....	2.01
Track at Gadsden, Ala. (N. C. & St. L. Ry.)	.74	.....	.74
Knoxville Division:			
Hyde to Fonde, Ky. (Southern Railway)	11.21	2.09	9.12

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Atlanta Division—New Line:			
Junta to Atlanta, Ga. (N. C. & St. L. Railway)	48.09	.....	48.09
Cumberland Valley Division:			
Virginia & Southwestern Tracks	15.65	.....	15.65
Norfolk & Western Tracks at Norton, Va.	.77	.....	.77
Straight Creek Coal & Coke Company's Track	3.89	3.89	.....
Atlanta & Birmingham Air Line Railway	77.40	.....	77.40
Morganfield Branch:			
Providence Coal Company's Track	.30	.30	.....
Southern Alabama Division:			
Western Railway of Alabama Track at Selma	.51	.....	.51
Myrtlewood Branch:			
Western Railway of Alabama Track at Selma	.36	.....	.36
Pensacola & Atlantic Division:			
A. C. L. Ry. Track at River Junction	1.04	.....	1.04
Cincinnati Division:			
P. C. C. & St. L. Ry. Track at Cincinnati, O.	.44	.....	.44
Louisville & Interurban Railway Track	7.70	7.70	.....

	Total.	In Kentucky.	Outside of Kentucky.
Lexington Branch:			
C. & O. Track at Lexington	.20	.20	.....
Lexington Union Station Company Track	.22	.22	.....
Kentucky Division:			
C. & C. Bridge Track	2.18	1.58	.60
St. Louis Division:			
B. & O. Ry. Track at East St. Louis, Ill	.11	.....	.11
Terminal Railroad Association of St. Louis Tracks	3.84	.....	3.84
Owensboro & Nashville Railway:			
Track at Owensboro, Ky. (L. H. & St. L. Ry.)	.26	.26	.....
Total operated under trackage arrangements	217.04	16.24	200.80

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by Copied.
Written by L. S. W.
Footings Verified by —— ——.
Called Back 1/20/14.
Read by C. R.
Watched by H. D.

EXHIBIT GEO. W. LAMB No. 29.

Lines Operated for Account of Owners.	Total.	In Kentucky.	Outside of Kentucky.
Elkton & Guthrie Railroad	10.92	10.92	.....
Glasgow Railway	10.50	10.50	.....
South & North Alabama Railroad	200.46	.....	200.46
Line Owned—Leased to N. C. & St. L. Ry., Operated under Trackage Arrangement.			
Memphis Line—Aulon to South Memphis	5.46	.....	5.46
Line Operated under Trackage Arrangement, Entire Capital Stock Owned—Property Operated under Its Own Organization.			
Louisville & Atlantic Division:			
Kentucky Highlands Railroad—Millville to Cliffside	6.46	6.46	.....
Lines Operated under Their Separate Organizations in which this Company Owns a Majority of the Capital Stock or is Interested as Joint Owner or Lessee:			
Nashville, Chattanooga & St. Louis Railway	925.01	8.23	916.78
Central Transfer Railway & Storage Company	.67	.67	.....
Georgia Railroad and Dependencies	571.00	.....	571.00
Chicago, Indianapolis & Louisville Railway	616.60	.....	616.60
Louisville, Henderson & St. Louis Railway	181.44	181.44	.....
Lexington & Eastern Railway	96.11	96.11	.....
New Orleans, Mobile & Chicago Railroad	547.06	.....	547.06
Total	2,937.89	286.45	2,651.44

Lines Owned by this Company but Operated by Other Companied:			
Paducah & Memphis Division	248.74	49.40	199.34
Clarksville & Princeton Branch—Gracey to Princeton, Kentucky	20.71	20.71	.....
Total	269.45	70.11	199.34
Resume.			
Owned and Operated	3,498.63	1,217.44	2,281.19
Operated as Owner of Entire Capital Stock	632.05	334.33	297.72
Operated Under Lease	118.97	.....	118.97
Operated Under Trackage Arrangement	217.04	16.24	200.80
Owned, Leased, Operated Under Trackage Arrangement	5.46	.....	5.46
Owner of Entire Capital Stock, Property Operated Separately, Operated by this Company under Trackage Arrangement	6.46	6.46	.....
	4,478.61	1,574.47	2,904.14
Operated for Account of Owners	221.88	21.42	200.46
Operated Under Separate Organizations	2,937.89	286.45	2,651.44
Owned but Operated by Other Companies	269.45	70.11	199.34
Total	7,907.83	1,952.45	5,955.38

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by Copied.
Footings Verified by —— ——.
Read by C. R.

Written by L. S. W.
Called Back 1/20/14.
Watched by H. D.

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EXHIBIT GEO. W. LAMB No. 30.

Louisville and Nashville Railroad Company.

Statement Showing the Real Value in Kentucky of Certain Corporations, Arrived at Either on Basis of Market Value of Stocks & Bonds, or by Capitalization of Net Income, as of June 30, 1912, and Values Assessed by the Board of Valuation and Assessment for 1913, and Percentage which said Assessed Values Bear to said Real Values.

			Valuation.	Assessment.	Percentage of assessment of total valuation.
Cumberland Pipe Line Company:					
Net Income of $107,139 capitalized at 6%.....			$1,780,000	$800,000	44.94%
Louisville Gas Company:					
Capital Stock outstanding.....	$3,600,000 par at $120	$4,320,000			
1st Mortgage 5% Gold Bonds.....	200,000 par at $100	200,000	4,520,000	2,250,000	49.78%
Louisville Lighting Company:					
1st Mortgage 5% Gold Bonds.....	$3,121,100 par at $100	3,121,000			
" " 6% Coupon Bonds.....	1,000,000 " " 100	1,000,000			
Preferred Stock Outstanding.....	108,000 " " 100	108,000			
Common Stock Outstanding.....	2,558,700 " " 60	1,535,220	5,764,220	3,800,000	65.92%

Louisville Street Railway Company:							
2d Mortgage 4½% Gold Bonds	$2,000,000	" "	$96¼	1,925,000			
Consol. Mortgage 5% Gold Bonds	5,997,000	" "	105	6,276,850			
Lou. City Ry. 6% Gold Bonds	2,000	" "	...	2,000			
Gen'l Mtge. 5% Gold Bonds	3,000,000	" "	102⅝	3,078,750			
Common Stock Outstanding	5,456,500	" "	96¼	5,251,881			
Preferred Stock Outstanding	2,500,000	" "	113	2,825,000	19,359,481	11,650,000	60.17%
Pullman Company:							
Capital Stock Outstanding	120,000,000	par					
Worth 161 June 29, 1912	193,200,000	market value					
Deduct used in manufacturing	18,000,000						
	175,200,000						
of which .009% is in Kentucky on mileage basis					1,576,800	600,000	38.05%
Kentucky Traction & Terminal Company:							
Interest paid $129,883—Capitalized at 6%					2,164,700	1,200,000	55.43%

W.

LOUISVILLE & NASHVILLE RAILROAD CO.
Comptroller's Office.

Statement.

Prepared by R. E. Fleming.
Written by L. S. W.
Footings Verified by C. R.
Called Back 1/20/14.
Read by C. R.
Watched by H. D.

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647 EXHIBIT G. W. L. No. 31.

FRANKFORT, KY., December 4, 1913.

I Chas. J. Veling, Chief Clerk of the Corporation Department in the Office of the Auditor of Public Accounts of the State of Kentucky, and Secretary of the Board of Valuation and Assessment, hereby certify that the attached papers, numbered 1 to 2, inclusive, are true and correct copies of the working papers and calculations which appear in the jacket or envelope in the Auditor's Office, with respect to the assessment of the franchise of the Cumberland Pipe Line Company, Inc., for taxation for the year 1914.

(Sgd.) CHAS. J. VELING,
Chief Clerk in the Corporation Department of the Auditor of Public Accounts, and Secretary of the Board of Valuation and Assessment.

Copy.

648 Cumberland Pipe Line Co.; as on Yellow Slip.

6)107,139

178,0000
80

1,424,000.00

$1,400,000 is an 80% assessment.

(Jacket.)

As finally assessed and paid on July 16th, 1913.	Total Capital	800,000
	Less tangible property..	361,924
	Franchise	438,076
	Tax	2,190.38

Copy.

(Here follows Exhibit A, report, marked pages 649 to 652.)

653 EXHIBIT G. W. L. No. 32.

FRANKFORT, KY., Dec. 4th, 1913.

I, Chas. J. Veling, Chief Clerk of the Corporation Department in the Office of the Auditor of Public Accounts of the State of Kentucky, and Secretary of the Board of Valuation and Assessment, hereby certify that the attached papers, numbered 1 to 2, inclusive, are true and correct copies of the working papers and calculations which appear in the jacket or envelope in the Auditor's Office, with respect to the assessment of the franchise of the Louisville Gas Company, Inc., for taxation for the year 1913.

(Sgd.) CHAS. J. VELING,
Chief Clerk in the Corporation Department of the Auditor of Public Accounts, and Secretary of the Board of Valuation and Assessment.

Copy.

654 EXHIBIT A.

Louisville Gas Company.

Stock	3,600,000			
	120			
Assets	720			
Should be	3,600			
$3,400,000	$4,320,000	Market Value.		
	200,000	Under the terms of the merger the city received 150 per share for its stock.		
	4,520,000	The other holders the equivalent of $120.00.		
	21,752		21,752	Int.
	216,000		216,000	Div.
	6)237,752		237,752	
			74,920	Credit.
$4,500,000	3,962,500			
	4,520,000		6)152,832	Net.
	2)8,482,500		2,547,000	
			4,520,000	Stk. & Bond.
	4,241,250	Average value.		
	80		2)7,067,000	
	3,393,000.00		3,533,000	Average.
			80	
			2,826,400.00	

4,520,000. Total Capital on basis of shares at 120 and bonds at par:

4,520	3,533
70	70
3,164,000	2,473,100
	2,250,000
3,160,000=70%	220,000

(Jacket.)

As finally assessed and paid on July 19, 1913.	Total Capital	$2,250,000
	Less tangible property, etc.	732,175
	Franchise	1,517,825
	Tax	7,589.13

Copy.

(Here follows Exhibit A, report, marked pages 655 to 658.)

659 EXHIBIT A.

EXHIBIT G. W. L. No. 33.

FRANKFORT, KY., December 4, 1913.

I, Chas. J. Veling, Chief Clerk of the Corporation Department in the Office of the Auditor of Public Accounts of the State of Kentucky, and Secretary of the Board of Valuation and Assessment, hereby certify that the attached papers, numbered 1 to 3, inclusive, are true and correct copies of the working papers and calculations which appear in the jacket or envelope in the Auditor's Office, with respect to the assessment of the franchise of the Louisville Lighting Co. *Company,* Inc., for taxation for the year 1913.

(Sgd.) CHAS. J. VELING,
Chief Clerk in the Corporation Department of the Auditor of Public Accounts, and Secretary of the Board of Valuation and Assessment.

Copy.

660 EXHIBIT A, #1.

Louisville Lighting Company.

107,724	Dep.	217,397	Int.	Bonds	4,121,000
231,727	Enl.	115,141	Div.	Stock	3,000,000
339,451		6)332,538			7,121,000
279,959	Def.				
		5,542,300			

The enlargement of plant and large charge for depreciation accounts for deficit.

80% of Capitalization of Net Income=$4,333,840.

This Company is closely allied with the Louisville Gas Co. They are being taken over by the Bylesby Syndicate and can show exactly the financial conditions of Cos. It might be well to make a high assessment to make them disclose.

5,542,300
80

4,333,840

Bonds.	Preferred.	
4,121,000	1,150,000	2,558,000
5	6	5%
206,050,000	69,000.00	127,900.00
6,480	108,000	2,558,000
	6	4
212,530		
127,900	6,480.00	102,320.00
340,430		

Bonds.	4,121,000	Par 5%	
Prefer. 2	108,000	Par 6%	
	4,229,000		
Common.	1,534,800	4¾%	2,558,000
	5,763,800		60
	80%		1,534,800.00
	4,611,040.00		

$4,500,000 for a tentative assessment seems right.
$5,500,000 tentative assessment 2.

EXHIBIT A.

661 Louisville Lighting Company.

Bonds.	Stock.	
4,121	2,666,700	
90	65	
3,708,900	133,335	
	160,002	
	1,733,355	Com. & Pref.
	3,708,900	
	5,442,255	
	80	
	4,353,600	
	5,442,255	
	70	
	3,809,578.50	

Jacket.

As finally Assessed and paid on July 19, 1913.

Total Capital	$3,800,000
Less Tangible Property etc.	817,240
Franchise	2,982,760
Tax	$14,913.80

Copy.

(Here follows Exhibit A, report, marked pages 662 to 665.)

666 EXHIBIT G. W. L. #34.

FRANKFORT, KY., December 4, 1913.

I, Chas. J. Veling, Chief Clerk of the Corporation Department in the Office of the Auditor of Public Accounts of the State of Kentucky, and Secretary of the Board of Valuation and Assessment, hereby certify that the attached papers, numbered 1 to 2, inclusive, are true and correct copies of the working papers and calculations which appear in the jacket or envelope in the Auditor's Office, with respect to the assessment of the franchise of the Louisville Railway Company, Inc., for taxation for the year 1913.

(Sgd.) CHAS. J. VELING,
Chief Clerk in the Corporation Department of the Auditor of Public Accounts, and Secretary of the Board of Valuation and Assessment.

Copy.

667 Louisville St. Ry. Co.

	508,750	Int.		6)44,885
	670,650	Div.		
	1,179,400			7,480.00 Dep.
Less.	111,235	Def.	Stock and Bonds.	
	6)1,068,065		Bonds.	10,999,000
			Stock. Pref.	2,500,000
	17,801,000	Total Capital.	Stock. Com.	5,456,500
	17,801,000			18,955,500
	70			70%
	12,460,700		Total Capital	13,268,850.00

This Company promptly paid last year's assessment. Would suggest that tentative assessment be same as last year.

(Jacket.)

As finally assessed and paid on July 3, 1913.	Total Capital	11,650,000
	Less Tangible Property etc..	3,303,580
	Franchise	8,346,420

Copy.

(Here follows report marked pages 668 to 671.)

FORM A-8. 2-20-1912 2500

REPORT

OF THE

Louisville Railway Company

TO THE

Auditor of Public Accounts of Kentucky

JUNE 30, 191V

ARTICLE IV, SUBDIVISION 1.

ASSESSMENT OF CERTAIN CORPORATIONS.

672 EXHIBIT A.

Exhibit G. W. L. No. 35.

FRANKFORT, KY., December 4, 1913.

I, Chas. J. Veling Chief Clerk of the Corporation Department in the Office of the Auditor of Public Accounts of the State of Kentucky, and Secretary of the Board of Valuation and Assessment, hereby certify that the attached papers, numbered 1 to 5, inclusive, are true and correct copies of the workers papers and calculations which appear in the jacket or envelope in the Auditor's Office, with respect to the assessment of the franchise of the Pullman Company, Inc., for taxation for the year 1913.

(Sgd.) CHAS. J. VELING,
Chief Clerk in the Corporation Department of the Auditor of Public Accounts, and Secretary of the Board of Valuation and Assessment.

Copy.

673 EXHIBIT A.

Pullman Co.

Operating Car Revenue.

12,719,552) 10,831,718.00 (85
10,175,641.6

656,076.40

85% of revenues of company are derived from operation of cars. Therefore that proportion of its entire capital must be employed as a common carrier.

Net Car Operating Revenues.

Less taxes:

10,831,718
931,134

6) 9,900,584

165,000,000
.009

1,485,000 In Ky.

Mileage Within & Without Kentucky.

216,969) 1,936,000 (.009
1,950,721

Stock and Bond Plan.

In report to Auditor Company state- its stock is worth $1.05 per share. This is a very low valuation on 8% stock on this basis.

120,000 shares *is* worth
105

600
120

126,000,000 Total Cap.
Deduct 18,000,000 Used in manufacture.
108,000,000
.009

972,000 In Ky.

674 Total Capital employed in business of company as shown by statement to Interstate Com. Commission.

148,000,000
Employed in Manf. Deduct. 22,200,000

125,800,000
.009

1,132,200 In Kentucky.
972,000 In Ky. Stock & Bond.
1,485,000 In Ky. Cap. Net Income.

6) 3,589,000

1,163,000 Average in Ky.
80

932,400 In Ky.

(Jacket.)

As finally assessed and paid on July 3, 1913,

Total Capital	$600,000
Less tangible property etc..	241,265
Franchise	358,735
Tax	$1,793.68

Copy.

675 EXHIBIT A.

Copy.

Report of The Pullman Company for the Year Ended June 30, 1912.

To the Auditor of Public Accounts, State of Kentucky:

The Pullman Company, a corporation of the State of Illinois, with its domicile and principle place of business in Chicago, Cook County, Illinois, by its Secretary A. S. Weinsheimer makes this report.

It is engaged in manufacturing all kinds of railroad cars and various other products, and in the business of furnishing sleeping and parlor cars to railroad companies for use by such railroad companies in operating their railroads.

The Stock of the Company is all Common Stock none preferred. Its total authorized capital stock is $120,000,000, divided into 1,200,000 shares of the par value of $100.00 each, but only approximately $33,055,000 of its capital stock is employed in the business of furnshing sleeping cars to railroad and railway companies, which is the only business in which the Company is engaged in the State of Kentucky. The balance of its Capital Stock is employed in manufacturing business and other enterprises outside of the State of Kentucky, and not connected with the sleeping car feature of
676 its business or with any business transacted by it in the State of Kentucky.

The real value of the shares of Capital Stock on June 30, 1912, according to the best of my judgment and belief, was One Hundred Five and 41/100 dollars ($105.41) per share.

I do not know and have no means of ascertaining the highest price at which any shares of the Capital Stock above mentioned were sold at a bona fide sale within twelve months next before June 30, 1912.

On June 30, 1912 there was no surplus or undivided profits attributable to the State of Kentucky.

The value of all assets at the close of last preceding fiscal year was $126,495,969.13, but the tangible assets in its sleeping car business are approximately $33,055,000. No indebtedness except for the Capitol Stock and Current expenses. Gross earnings or income in Kentucky $41,844.14. No net earnings or income attributable to Kentucky on June 30, 1912 the company owned tangible property in Kenton County and in Jefferson County which will be assessed for 1912, in those counties and certificates of the County Clerk sent as soon as possible after assessments are made.

677 The total length of all railroad lines over which this Company's cars are run is 216,969 miles. The total length of all railroad lines in the State of Kentucky over which this Company's cars are run is 1,936.32 miles, and the length of such lines in each county, city, and town is as shown in the attached schedule.

(Signed) A. S. WEINSHEIMER, *Secretary.*

STATE OF ILLINOIS,
County of Clark, ss:

This day personally appeared before me, a Notary Public in and for the County and State aforesaid, A. S. Weinsheimer whose signature is hereto attached, and made oath that the statements made in the foregoing report are true to the best of his knowledge and belief.

Given under my hand and seal this 27th day of September, A. D. 1912.

(Sgd.) ALBERT P. LORENZ, *Notary Public.*

678 EXHIBIT A.

Copy.

EXHIBIT G. W. L. No. 36.

FRANKFORT, KY., December 4, 1913.

I, Chas. J. Veling, Chief Clerk of the Corporation Department in the Office of the Auditor of Public Accounts of the State of Kentucky, and Secretary of the Board of Valuation and Assessment, hereby certify that the attached papers, numbered 1 to 2, inclusive, are true and correct copies of the working papers and calculations which appear in the jacket or envelope in the Auditor's Office, with respect to the assessment of the franchise of the Kentucky Traction Terminal Company, Inc., for taxation for the year 1913.

(Sgd.) CHAS. J. VELING,
Chief Clerk in the Corporation Department of the Auditor of Public Accounts, and Secretary of the Board of Valuation and Assessment.

679 EXHIBIT A.

Copy.

Kentucky Tract. and Terminal Co. (as Shown on Yellow Sheet).

6)129,883

2,164,700
8

1,731,760

The amended report of this Company shows payment of interest in the above sum—but also shows a large deficit—There is no information in report as to the value of its stocks and bonds. It is probable the Company is highly over capitalized. Because of its over capitalization and the uncertain value of its stocks and bonds would suggest a tentative assessment of $1,311,080, an increase of $600,000.00 over last year.

(Jacket.)

As finally assessed and paid on August 8, 1913.

Total Capital	$1,2000,000
Less tangible property, etc.	711,080
Franchise	488,920
Tax	2,444,600

(Here follows report marked pages 680 to 683.)

684 At the conclusion of the testimony of Mr. Lamb, Counsel for the Louisville & Nashville Railroad Company, at the request of the Board, furnished a statement marked "Board's Exhibit A", showing par value, ledger value, real value, rate of dividend and amount of dividend for stocks of foreign corporations owned by the Louisville & Nashville Railroad Company, which do not pay taxes in the State of Kentucky, and which are not represented in the mileage of the Louisville & Nashville Railroad Company for its own account, which exhibit is as follows:

Louisville and Nashville Railroad Company.

Statement Showing Par Value, Ledger Value, Real Value, Rate of Dividend and Amount of Dividend for Stocks of Foreign Corporations Owned by the Louisville and Nashville Railroad Company, which do Not Pay Taxes in the State of Kentucky, or which are Not Represented in the Mileage Operated by the ***Louisville & Nashville*** *Railroad Company, for its Own Account.*

	Number of shares.	Value.			Dividend.	
		Par.	Ledger.	Real.	Rate.	Amount.
Atlanta & West Point Railroad Company	1,106½	$110,650.00	$149,377.50	$165,975.00	6%	$6,639.00
Augusta Belt Railway	325	32,500.00	32,275.67	32,275.67	.....	.....
Augusta & Summerville Railroad	250	25,000.00	9,527.50	9,527.50	.....	.....
Augusta Union Station Company	125	12,500.00	625.00	625.00	*4%	25.00
Cincinnati Inter-Terminal Railroad, Pref.	1,405	140,500.00	140,500.00	140,500.00	4%	5,300.00
Goodlettsville & Greenbrier Railroad	100	10,000.00	10.00	10.00	.....	.....
Lewisburg & Northern Railroad Company	1,000	100,000.00	10.00	100,000.00	.....	.....
Memphis Railroad Terminal Company	100	10,000.00	10,000.00	10,000.00	.....	.....
Milledgeville Railway	150	15,000.00	17,500.00	17,500.00	.....	.....
Missouri & Illinois Bridge & Belt Company	130	13,000.00	13,000.00	13,000.00	38.46%	5,000.00
Monroe Railroad	500	50,000.00	5.00	5.00	.....	.....
New Orleans, Mobile & Chicago Railroad, Pref.	2,166	216,600.00	21,620.03	10.00	.....	.....

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VERTICAL IN

New Orleans, Mobile & Chicago Railroad, Common	23,852½	2,385,254.59	362,145.89	10.00	.....	.....
South & North Alabama Railroad, Pref.	20,000	2,000,000.00	2.50	2,000,000.00	.....	.....
South & North Alabama Railroad, Common	11,352⅓	1,135,233.33	457.50	1,135,233.00	.....	.....
Terminal Railroad Association of St. Louis	2,058	205,800.00	10.00	205,800.00	.....	.....
Woodstock & Blocton Railway	1,200	120,000.00	120,348.47	120,000.00	5%	6,000.00
Lexington Terminal Railroad (of Georgia)	33	3,300.00	3,300.00	3,300.00	.....	.....
South Carolina & Augusta Railroad—Subscription (5% on)	1,000	5,000.00	860.08	10.00	.....	.....
Buck Creek Cotton Mills, Pref.	300	30,000.00	30,066.13	30,000.00	.....	.....
Atlantic Compress Company	259	25,900.00	25,900.00	25,900.00	.....	.....
Gulf Transit Company	823	82,300.00	10.00	82,300.00	.....	.....
Republic Iron & Steel Company, Pref.	548	54,800.00	57,379.90	54,800.00	5¼%	2,877.00
Republic Iron & Steel Company, Common	461	46,100.00	15,706.13	20,000.00	1%	461.00
St. Louis & Tennessee River Packet Company	277	27,700.00	30,314.13	27,700.00	5%	1,385.00
Southern Iron & Steel Company, Pref.	617	61,717.82	36,688.55	25,000.00	.....	.....
Tennessee River Packet Company	504	25,200.00	10.00	10.00	.....	.....
Total		$6,944,055.74	$1,077,649.98	$4,219,491.17		$27,687.00

* 4% on amount paid in.

b.

686 Mr. Lamb also, at the request of the Board, furnished and filed a statement, not identified by any mark, showing dividends declared on capital stock from 1853 to June 30, 1913, which exhibit is as follows:

Statement Showing Number and Rate of Cash and Stock Dividends Declared on Capital Stock from 1853 to June 30, 1913.

Year.	Cash dividend.		Stock dividend.		Capital stock at close of fiscal year.	Dividends.		
	No.	Rate.	No.	Rate.		Cash.	Stock.	Total.
1853	..	...	..	..	$28,000.00			
1854	..	...	..	..	648,600.00			
1855	..	...	..	..	784,270.00			
1856	..	...	..	..	1,400,000.00			
1857	..	...	..	..	1,976,870.00			
1858	..	...	..	...	2,008,360.00			
1859	..	...	..	..	2,032,150.00			
1860	..	...	..	..	2,338,720.00			
1861	..	...	..	..	2,434,750.00			
1862	..	...	1	¼%	3,700,000.00		$9,250.00	$9,250.00
1863	..	...	..	..	5,132,647.00			
1864	3	6%	2	10	5,641,595.00	$338,498.72	513,264.70	851,763.42
1865	4	4	..	..		221,132.32		
	5	4	..	..	5,529,825.00	221,193.00		442,325.32
1866	6	4	..	..		219,724.64		
	7	4	..	..	5,490,106.00	219,604.26		439,328.90
1867	8	4	..	..		219,662.58		
	9	4	..	..	5,492,636.00	219,705.54		439,368.12
1868	10	4	..	..		225,544.95	(*)	
	11	3	3	40	7,770,186.00	233,105.59	2,475,755.16	2,934,405.70
1869	12	3	..	..		233,106.76	(‡)	
	13	4	..	..	8,681,700.00	347,268.00	260,000.00	840,374.76

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ROBERT L. GREENE, AUDITOR, ETC., ET AL.

Year.	Cash dividend.		Stock dividend.		Capital stock at close of fiscal year.	Dividends.		
	No.	Rate.	No.	Rate.		Cash.	Stock.	Total.
1870	14	3	..	..		260,460.00		
	15	4	..	..	8,680,900.00	347,236.00		607,696.00
1871	16	3	..	..		260,394.00		
	17	4	..	..	8,873,500.00	354,940.00		615,334.00
1872	18	3	..	..		269,313.00		
	19	4	..	..	8,980,700.00	359,228.00		628,541.00
1873	20	3	..	..		269,442.00		
	21	4	..	..	8,982,400.00	359,296.00		628,738.00
1874	..	...	..	..	8,984,601.00			
1875	..	...	..	..	8,988,301.00			
1876	..	...	..	..	9,003,219.00			
1877	22	1½	..	..	9,003,600.00	135,054.00		135,054.00
1878	23	1½	..	..		135,057.00		
	24	1½	..	..	9,007,800.00	135,117.00		270,174.00
1879	25	1½	..	..		135,123.00		
	26	2½	..	..	9,052,900.00	226,322.50		361,445.50
1880	27	3	..	..		271,602.00		
	28	5	4	100	9,059,300.00	452,965.00		724,567.00
1881	29	3	..	..		543,900.00		
	30	3	..	..	18,130,000.00	543,900.00	9,065,000.00	10,152,800.00
1882	31	3	..	..	18,130,000.00	543,900.00		543,900.00
1883	..	...	..	..	†30,000,000.00			
1884	..	...	..	..	30,000,000.00			
1885	..	...	..	..	30,000,000.00			
1886	..	...	..	..	30,000,000.00			
1887	..	...	..	..	30,000,000.00			
1888	..	...	5	2			600,000.00	

	..	...	6	3	30,600,000.00		918,000.00	— 1,518,000.00
1889	..	...	7	2			630,360.00	
	..	...	8	3	32,148,000.00		964,440.00	1,594,800.00
1890	..	...	9	3			992,300.00	
	..	1.1	10	1.9	47,106,100.00	518,167.10	894,900.00	2,405,367.10
1891	33	2½	..	..		1,200,000.00		
	34	2½	..	..	48,000,000.00	1,200,000.00		2,400,000.00
1892	35	2½	..	..		1,320,000.00		
	36	2	..	..	52,800,000.00	1,056,000.00		2,376,000.00
1893	37	2	..	..		1,056,000.00		
	38	2	..	..	52,800,000.00	1,056,000.00		2,112,000.00
1894	..	...	..	..	52,800,000.00			
1895	..	...	..	..	52,800,000.00			
1896	..	...	..	..	52,800,000.00			
1897	..	...	..	..	52,800,000.00			
1898	..	...	..	..	52,800,000.00			
1899	39	1½	..	..		792,000.00		
	40	2	..	..	52,800,000.00	1,056,000.00		1,848,000.00
	41	2	..	..		1,056,000.00		
1900	42	2	..	..	52,800,000.00	1,056,000.00		2,112,000.00
1901	43	2½	..	..		1,320,000.00		
	44	2½	..	..	55,000,000.00	1,375,000.00		2,695,000.00
1902	45	2½	..	..		1,375,000.00		
	46	2½	..	..	60,000,000.00	1,500,000.00		2,875,000.00
1903	47	2½	..	..		1,500,000.00		
	48	2½	..	..	60,000,000.00	1,500,000.00		3,000,000.00
1904	49	2½	..	..		1,500,000.00		
	50	2½	..	..	60,000,000.00	1,500,000.00		3,000,000.00
1905	51	3	..	..		1,800,000.00		
	52	3	..	..	60,000,000.00	1,800,000.00		3,600,000.00

1906.....	53	3	..	..		1,800,000.00		
	54	3	..	..	60,000,000.00	1,800,000.00		3,600,000.00
1907.....	55	2	..	..		1,800,000.00		
	56	3	..	..	60,000,000.00	1,800,000.00		3,600,000.00
1908.....	57	3	..	..		1,800,000.00		
	58	2½	..	..	60,000,000.00	1,500,000.00		3,300,000.00
1909.....	59	2½	..	..		1,500,000.00		
	60	3	..	..	60,000,000.00	1,800,000.00		3,300,000.00
1910.....	61	3½	..	..		2,100,000.00		
	62	3½	..	..	60,000,000.00	2,100,000.00		4,200,000.00
1911.....	63	3½	..	..		2,100,000.00		
	64	3½	..	..	60,000,000.00	2,100,000.00		4,200,000.00
1912.....	65	3½	..	..		2,100,000.00		
	66	3½	..	..	60,000,000.00	2,100,000.00		4,200,000.00
1913.....	67	3½	..	..		2,100,000.00		
	68	3½	..	..	71,963,800.00	2,518,733.00		4,618,733.00
Equivalent Investment for one year.....					$1,765,985,538.00			
Return on Investment.....						$65,856,695.96	$17,323,269.86	$83,179,965.82
Average Annual Capital Stock and Average Annual Return					28,950,582.59	1,079,617.97	283,988.03	1,363,606.00
Average Return per year for period of sixty-one (61) years.....								4.71%

* The added amount over 40% on the stock is dividend paid on subsequent conversions of M. & O. Stock and County Tax Receipts, which conversions account for the remaining increase in stock.

† Sundry increases, $3,513.00. stock pledged with City of Louisville released, $3,080,000.00, increase of October 4, 1882, $8,786,487.00, makes total of $30,000,000.00.

‡ Stock dividend on subscription to Richmond Branch paid by Madison and Garrard Counties, and individuals in said Counties, and Lincoln County, per resolution of the Board March 1, 1869, being 40% dividend on $650.-000.00 subscription.

b.

688 Mr. Lamb also, at the request of the Board, furnished and filed a statement marked "Board's Exhibit B," being "a statement showing lines operated for account of owners, lines operated under their separate organizations in which this company owns a majority of the capital stock, or is interested as joint owner or lessee, lines owned by this company, but operated by other companies, and percentage that lines in and out of Kentucky bears to the total."

689 BOARD'S EXHIBIT "B."

Louisville and Nashville Railroad Company.

Statement Showing Lines Operated for Account of Owners, Lines Operated under Their Separate Organizations in which this Company Owns a Majority of the Capital Stock, or is Interested as Joint Owner or Lessee, Lines Owned by this Company But Operated by Other Companies, and Percentage that Lines in and Out of Kentucky Bear to the Total.

	Total.	In Kentucky.	Outside of Kentucky.
Lines operated for account of owners:			
Elkton & Guthrie Railroad	10.92	10.92	.....
Glasgow Railway	10.50	10.50	.....
South & North Alabama Railroad	200.46	.....	200.46
Total	221.88	21.42	200.46
Lines operated under their separate organizations in which this company owns a majority of the capital stock or is interested as joint owner, or lessee:			
Nashville, Chattanooga & St. L. Ry	925.01	8.23	916.78
Cent. Trans. Ry. & Storage Co.	.67	.67	.....
Georgia Railroad & Dependencies	571.00	.....	571.00
Chi., Indianapolis & Louisv. Ry.	616.60	.....	616.60
Louisv. Hend. & St. Louis Ry.	181.44	181.44	.....
Lexington & Eastern Railway	96.11	96.11	.....
New Orleans, Mobile & Chi. R. R.	547.06	.....	547.06
Total	2,937.89	286.45	2,651.44
Lines owned by this company but operated by other companies:			
Paducah & Memphis Division	248.74	49.40	199.34
Clarksville & Princeton Branch—Gracey to Princeton, Ky.	20.71	20.71	.....
Total	269.45	70.11	199.34

Résumé.

Operated for Account of Owners.....	221.88	21.42	200.46
Operated under Separate Organizations	2,937.89	286.45	2,651.44
Owned but Operated by Other Companies	269.45	70.11	199.34
Total	3,429.22	377.98	3,051.24
Percentage that Lines in and out of Kentucky bear to total.....	100%	11.022%	88.978%

b.

690 At this point in the hearing before the Board, the Attorney General (General Garnett) read a statement prepared by himself accompanied by certain affidavits. But as this statement was subsequently quoted in full in an affidavit of the Auditor, H. M. Bosworth, afterwards filed in court, and which will hereafter be set forth at length herein, the statement of General Garnett is not here inserted, but will appear in said affidavit of Bosworth. And so as to the said affidavits filed by the Attorney General, they were also filed before the Court and will be hereafter given, as will also various affidavits filed by the Railroad Company before the Board and there read, but which were afterwards also filed before the Court and will be hereafter given.

The Attorney General read before the Board the following letters, to-wit:

"LOUISVILLE, KY., October 12th, 1910.

Mr. F. P. James, Auditor, Public Accounts, Frankfort, Ky.

DEAR SIR: Your notice dated October 7, 1910, with respect to Franchise Reports of the Madisonville, Hartford and Eastern Railroad Company not having been received in your office, has been referred to me for attention.

This is to advise you that the road of the Madisonville, Hartford and Eastern Railroad Company was placed in operation on January 4, 1910, and is operated as an integral part of the Louisville and Nashville Railroad system, and the results of its operation were included in the Report of the Louisville and Nashville Railroad Company for the fiscal year ended June 30, 1910, forwarded to you on September 30, 1910.

It will therefore not be necessary to render separate report for the Madisonville, Hartford and Eastern Railroad Company.

Yours truly,

CHARLES HAYDON,
Comptroller."

"LOUISVILLE, KY., December 19th, 1912.

Hon. H. M. Bosworth, Auditor, State of Kentucky, Frankfort, Ky.

691 DEAR SIR: Again referring to your letter of the 12th inst., to Col. H. L. Stone, General Counsel, relative to certifying the

assessment in the various counties and municipalities for franchise purposes for the year 1912.

In writing you on December 17th, I overlooked the fact that you had included in the list sent me the Madisonville, Hartford and Eastern Railroad and the Morganfield & Atlanta Railroad, neither road of which is owned by the L. & N. R. R. Co., and therefore should not be included in your certification to the Counties and municipalities along the line of these two roads, and should be cut out of the list which you sent me.

Will you please see that this is done.

Yours truly,

C. O. BRADFORD,
Real Estate Agent."

Copy to Col. H. L. Stone, General Counsel.

"December 20th, 1912.

Mr. C. O. Bradford:

Your letter in reference to the certification of the Madisonville, Hartford & Eastern R. R. and the Morganfield and Atlanta, permit me to say that neither one of the companies has reported to this office, and in consideration of such acts and the fact that heretofore the L. & N. R. R. Co. had paid taxes, including the mileage of these roads I assumed that it was proper to include them this time, but will do as you direct and that is to ask the county clerks to cancel such mileage and values, I having mailed them out on the 18th.

Yours truly,

H. M. BOSWORTH, *Auditor.*
By ——— ———,
Chief Clerk, Corporation Dept."

692 *Testimony of Chas. J. Veling, Called as a Witness by the Board.*

I am the Corporation Clerk in the Auditor's office, and have charge of the records showing the distribution of franchises. The franchise of the Louisville & Nashville Railroad before the year 1910, with respect to the Madisonville, Hartford & Eastern Railroad, was distributed differently from what it was afterward. The books show that that railroad was included in the L. & N.'s distribution. These two roads (apparently referring to the Madisonville, Hartford & Eastern and the Morganfield & Atlanta) were included as a part of the whole system in the franchise distribution; and I had included them in distributing the franchise for the year 1911 before I received the letter signed by Mr. Bradford. After sending them a copy of the distribution, they asked me to cancel them, which I did. At that time those two roads had not filed with the Auditor a separate report to enable this board to fix the franchise valuation of them. It was after I had prepared to distribute the

franchise and after the letter from Mr. Bradford had been received, and after I had written the letter which has been read into the record, that they filed the report required, in order to have the franchise value of those two roads fixed separately from the L. & N., and it was because of their request that I did not distribute the franchise over those two roads. After they had asked me to cancel them I wanted to ascertain who the owner was and wrote those companies for the reports and got them. They are here now.

Cross-examination of Chas. J. Veling by the General Counsel of the L. & N. R. R. Co.:

I have been asked as to 1910 and 1912 distribution of the L. & N. franchise assessment. There was no distribution of that franchise on the Madisonville, Hartford & Eastern or the Morganfield and Atlanta for 1911, and the correction made in 1912 simply conformed to the preceding year and made both the same, and the reports I have got are for both of those years. There was no distribution of the franchise of those two roads assessed against the L. & N. for either the year 1911 or 1912.

Agreement Between L. & N. R. R. Co. and Chas. E. Hoge.

The Attorney General introduced and read in evidence an
693 agreement of April 1, 1912, between the Louisville & Nashville Railroad Company and Charles E. Hoge of Frankfort, Ky., which is as follows:

"This agreement made and entered into this 1st day of April, A. D., 1912, by and between the Louisville & Nashville Railroad Company, a corporation created and existing under the laws of the State of Kentucky (hereinafter designated as the Railroad Company), party of the first part, and Charles E. Hoge, of Frankfort, Kentucky, (hereinafter designated as Purchaser), party of the second part,

Witnesseth:

1st. That the Railroad Company is the present owner and holder of the entire capital stock of the Frankfort & Cincinnati Railway Company (hereinafter designated as Railway Company), consisting of Sixteen hundred (1600) shares of the par value of Twenty-five ($25.00) Dollars each, or having in all a face value of Forty Thousand ($40,000) Dollars.

2nd. That the Railroad Company is also the owner of the entire issue of bonds, being One Hundred and Sixty Thousand ($160,000.00) Dollars, secured by first mortgage & Trust Company, of Frankfort, Kentucky, Trustee, on all the property and franchises of said Railway Company; said bonds bearing interest at the rate of four (4%) per cent per annum and maturing on the 1st day of January, 1923.

3rd. That said Railroad Company is also a creditor of said Railway Company for moneys advanced and other indebtedness to the

amount of approximately of One Hundred and Forty One Thousand, Seven Hundred and Eighty-Three and 07/100 ($141,783.07) Dollars, as of this date, which said indebtedness is to be credited with the sum of Sixty Thousand ($60,000.00) Dollars in consideration of the conveyance of certain lands by the Railway Company to the Railroad Company, as set out in the Fourth Clause of this agreement, and for the remainder of said indebtedness bonds shall be issued to the Railroad Company secured by a second mortgage to be executed by said Railway Company to a trustee on all its railroad properties and franchises.

4th. The said Railroad Company is desirous, pursuant to the opinion and mandate of the Kentucky Court of Appeals in the case of Commonwealth of Kentucky, ex rel., James Breathitt, Attorney General, versus Louisville & Nashville Railroad Company, et al., recently decided by that Court, upon which a judgment will be entered in the Franklin Circuit Court, to dispose of its stock ownership and control of said Railway Company, and said Purchaser is desirous to obtain such stock ownership and control thereof by the purchase of a majority of the capital stock of said Railway Company, which said Railroad Company is willing to sell on the terms and conditions hereinafter stated:

Now, Therefore, in consideration of the premises and of the mutual covenants hereinafter set forth, the said first and second parties do agree as follows, to-wit:

First. The Railroad Company agrees to and does hereby sell and said Purchaser agrees to and does hereby purchase Eight Hundred and One (801) shares of the capital stock of the Frankfort & Cincinnati Railway Company, owned and held by the Railroad Company, being the majority of said entire capital stock, of the par value of Twenty Thousand and Twenty-five ($20,025.00) Dollars, at the rate of Twelve and 50/100 ($12.50) Dollars per share, or Ten Thousand and Twelve and 50/100 ($10,012.50) Dollars in all, to be paid for in ten (10) equal annual installments of One
694 Thousand and One and 25/100 ($1,001.25) Dollars, each installment to bear interest at the rate of four (4) per cent per annum from date until paid. Certificates for the shares of stock to the number aforesaid shall upon the execution of this agreement be transferred by the Railroad Company, and a new certificate in lieu thereof shall be issued by the Railway Company to said Purchaser, and by him shall be endorsed to the Railroad Company to be by it held, as collateral security, for the payment of said purchase-money, and, in the event of default in any installment thereof for six months after maturity, said Railroad Company may, at its option, sell said shares, or a sufficient number thereof, to satisfy the matured debt with accrued interest and costs.

Second. The Railroad Company guarantees that the annual net earnings of the Frankfort & Cincinnati Railway Company for a period of ten years, beginning July 1, 1912, shall be sufficient to justify dividends of two (2) per cent annually on the face value of its capital stock, and the Railroad Company agrees to make good to said Purchaser before the thirty first day of July of each of said

years any deficiency that may exist in such net earnings for the year ending June 30 preceding.

Third. The Purchaser aforesaid hereby further agrees that the Railroad Company shall have the exclusive right to re-purchase from him the said Eight Hundred and One (801) shares of stock in the Railway Company at the same price paid therefor by said Purchaser, with accrued interest thereon at the rate of four (4) per cent per annum (less the dividends received on said shares of stock), at any time prior to July 1, 1922, provided, in the meantime, the Constitution and laws of Kentucky shall have been so changed or amended as to enable the Railroad Company lawfully to acquire or operate the said Frankfort & Cincinnati Railway.

And said Purchaser hereby agrees and binds himself, his heirs, devisees, distributees, and personal representatives, in the event the Constitution and laws of Kentucky, shall not have been so changed or amended during the period of ten (10) years beginning July 1, 1912, to unite with the Railroad Company at any time after the expiration of said period and prior to July 1, 1932, on the request of the Railroad Company, in the sale and transfer of all shares of the capital stock held by him and the Railroad Company in the said Railway Company to the same person or corporation who may lawfully acquire or operate said Frankfort & Cincinnati Railway, and to accept in such sale and transfer as the purchase price for his Eight Hundred and One (801) shares of said stock the same price he paid the Railroad Company therefor, with accrued interest at the rate of four (4) per cent per annum (less the dividends received on said shares of stock.)

And it is hereby agreed between the Purchaser and the Railroad Company that the certificate for said Eight Hundred and One (801) shares of stock, after said Purchaser has paid the purchase price therefor, in accordance with the terms of this agreement, shall be deposited with the Fidelity & Columbia Trust Company, of Louisville, Kentucky, as trustee, in trust for the purpose of securing and carrying out the agreement aforesaid on the part of said Purchaser to unite, on the request of the Railroad Company, in the sale and transfer of all the shares of stock held by him and the Railroad Company in the Railway Company to the same person or corporation on the terms and conditions above set out, at any time after the expiration of the ten (10) year period beginning July 1, 1912, and prior to July 1, 1932.

Fourth. The purchaser will, immediately after the re-organization of the Frankfort & Cincinnati Railway Company, under his stock ownership and control, shall have been affected, cause the Board of Directors thereof to authorize, and the company to execute and deliver to the Louisville & Nashville Railroad Company, a
695 deed conveying all the right, title, and interest of said Railway Company in and to certain parcels of land, the consideration therefor being the said sum of Sixty-Thousand ($60,000.00) Dollars, which is to be credited as of the date of such deed upon the indebtedness of said Railway Company to said Railroad Company, amounting at this date to approximately One Hundred and Forty

One Thousand, Seven Hundred and Eighty Three and 07/100 ($141,783.07) Dollars, and which conveyance is to operate as a release and cancellation of the lease dated August 27, 1903, from said Railway Company to said Railroad Company of the lands therein described, which lease is recorded in Deed Book No. 43, page 598, in the office of the Clerk of the Franklin County Court, State of Kentucky, and said conveyance is also to operate as release and cancellation of the unrecorded supplemental lease from said Railway Company to said Railroad Company, dated January 24, 1908.

Said lots and parcels of land are described substantially as follows:

All lots and parcels of land situated in the City of Frankfort, Kentucky, described in said lease dated August 27, 1903, and the blueprint attached thereto and made part thereof, with the improvements thereon, except the main track of the Railway Company; and in addition thereto the following described lots and parcels of land in said City:

1. The parcel of land conveyed to said Railway Company by Mary Ashmore by deed dated September 15, 1906, recorded in Deed Book 49, page 476, in the office of the County Court Clerk of Franklin County, Kentucky.

2. The strip of land granted to the Kentucky Midland Company, of which the Railway is the legal successor, by an act of the General Assembly of the Commonwealth of Kentucky, approved February 24, 1888.

3. The tract of land conveyed to the Railway Company by George B. Harper and wife by deed dated October 29, 1906, recorded in Deed Book No. 50, page 1, of said County Court Clerk's office.

4. The parcel of land conveyed by Orlando Brown and others to said Midland Railway Company, of which the said Railway is the legal successor, by deed dated June 17, 1889, recorded in Deed Book No. 26, page 414, of said County Court Clerk's office.

5. The tract of land conveyed to said Railway Company by Mason P. Brown, Trustee, for Hettie H. Brown and her children, and Hettie H. Brown, by deed dated September 20, 1906, recorded in Deed Book 49, page 479, of said County Court Clerk's office.

6. The lot of land conveyed to said Railway Company by E. M. Wallace and wife by deed dated April 23, 1904, recorded in Deed Book 44, page 404, of said County Court Clerk's office.

7. A parcel of land containing about four (4) acres, being a part of the same land conveyed to the said Railway Company by George B. Harper and wife, by deed dated September 2, 1910, recorded in Deed Book 58, page 244, of said County Court Clerk's office.

8. The tract of land conveyed to said Railway Company by E. M. Wallace and wife by deed dated July 27, 1907, recorded in Deed Book 51, page 516, of said County Court Clerk's Office, to-
696 gether with all the improvements on said tracts or parcels of land, except the main railroad track and the right of way on which the same is laid.

In Witness Whereof, the said Railroad Company and Purchaser have hereunto set their signatures, and the former has caused the

same to be attested by its —— ——, Secretary, with its corporate seal attached, executed in duplicate, this the date first above written.

[SEAL.] LOUISVILLE & NASHVILLE RAILROAD CO.,
By M. H. SMITH, *President.*
CHAS. E. HOGE, *Purchaser.*

Attest:
J. H. ELLIS, *Secretary.*"

The foregoing was all of the evidence heard before the Board of Valuation and Assessment and contained in the record of proceedings before the Board which was filed as Exhibit A, with the Bill of Complaint, and were stipulated to be correct and was read in evidence before the Court, except certain affidavits of witnesses heretofore referred to, and which will be hereafter given.

Affidavit of Geo. W. Lamb No. 1.

Plaintiff read in evidence before the Court as a deposition (under stipulation) an affidavit of Geo. W. Lamb, referred to as Affidavit of Geo. W. Lamb No. 1, which was as follows:

697 In the District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
versus
H. M. BOSWORTH et al., Defendants.

Affidavit of Geo. W. Lamb, No. 1.

The affiant, Geo. W. Lamb, says that he is forty years of age and is a resident of Louisville, Ky., and is Second Assistant Comptroller of the Louisville & Nashville Railroad Company, and that his duties as such Second Assistant Comptroller are to assist the Comptroller of said company in the supervision and direction of all of the accounts, records and statistics of said company; that he has been connected with the accounting department of the Louisville & Nashville Railroad Company for nearly fourteen years, and is familiar with all of the accounts, records and statistics of said company.

Affiant says particularly that during the last four or five years his time has been devoted very largely to the preparation of statistics and investigations as to the values of properties of the
698 Louisville & Nashville Railroad Company in the several States through which the lines of that company pass; that he has prepared, and supervised the preparation of, reports of the

Louisville & Nashville Railroad Company to the Railroad Commission of the State of Kentucky, to the Railroad Commissions of other States to which the Louisville & Nashville Railroad Company renders such reports, and to the Interstate Commerce Commission, and he is familiar with the facts and figures set forth in said reports, and with the sources from which said reports are compiled.

Affiant also states particularly that he is familiar with the facts and figures set forth in the report of the Louisville & Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30, 1912, made for the purpose of assessing the franchise or intangible properties of the Louisville & Nashville Railroad Company in Kentucky for taxation for the year 1913, and he is likewise familiar with the facts and figures contained in the Annual Report of the Louisville & Nashville Railroad Company to its stockholders for the fiscal year ended June 30, 1912, and with the reports for other fiscal years, and with the sources from which those reports were compiled.

Affiant further states that he has read the final notice dated December 29, 1913, from H. M. Bosworth, Auditor, showing the final assessment made by the State Board of Valuation and Assessment for the franchise of the Louisville & Nashville Railroad Company for the taxes of 1913, and that he has also read the Opinion
699 and Order rendered and made by said Board in connection with said final assessment, and he is familiar with all of the reports, records, accounts and statistics referred to in said Opinion and Order and claimed by said Board in said Opinion and Order to have been considered by it.

Method Used by the Board of Valuation & Assessment in Assessing the Franchise of the Louisville & Nashville Railroad Company for Taxation for the Year 1913.

The said Board of Valuation and Assessment in said report by it made, claims to have adjudged and determined the fair cash value of the capital stock of the Louisville & Nashville Railroad Company to be $262,252,566.00,

and of this total value the Board assigned or apportioned to the State of Kentucky 35.15% which it claimed to be the proportion of the capital stock in Kentucky on a "mileage basis," and the amount so assigned by the Board to the State of Kentucky out of said total value of the capital stock was.... 92,181,776.00.

The Board then made some calculations showing what it claimed to be the result of apportionments made according to other plans, including apportionments made in part, or in whole, upon what it claimed to be the "gross income basis":
700 and after making said calculations, and not as a result of any of said calculations, the Board arbitrarily added to the amount apportioned by it to the State of Kentucky, as above set forth, the amount of..... 2,318,224.00,

and the Board so claims to have fixed and determined the value of Kentucky's proportion of the entire capital stock of the Louisville & Nashville Railroad Company to be..... 94,500,000.00; after having thus fixed, as claimed by it, the full or 100% value of Kentucky's proportion of the entire capital stock of the Louisville & Nashville Railroad Company to be..... 94,500,000.00 the Board claims to have equalized said amount at less than 80%, and so claims to have fixed and determined the value of the capital stock of the Louisville & Nashville Railroad Company, in Kentucky, for the year 1913, for taxation purposes to be 75,159,402.00

The amount of $75,159,402.00 so fixed by the Board as the value for taxation purposes of the capital stock of the Louisville & Nashville Railroad Company, in the State of Kentucky, is something over 79.5% of the amount of $94,500,000.00 so claimed by the Board to have been fixed and determined by it as the full value of Ken-
701 tucky's proportion of the entire capital stock of the Louisville & Nashville Railroad Company.

From the amount so fixed by the Board as the value for taxation purposes of the capital stock of the Louisville & Nashville Railroad Company in Kentucky for the year 1913 ..... $75,159,402.00, the Board deducted as the assessed value of the tangible property of the Louisville & Nashville Railroad Company, the amount of..... 29,500,772.00, and so claims to have fixed the remainder, or.... 45,658,630.00, as the value of the franchise of the Louisville & Nashville Railroad Company in Kentucky subject to taxation for the year 1913.

Affiant says that said assessment of the value of the franchise of the Louisville & Nashville Railroad in Kentucky subject to taxation for the year 1913, at the amount of..... 45,658,630.00 is excessive, unreasonable and unjust, and could not and can not be arrived at from a consideration of any of the facts, figures, or reports which the Board claims to have considered in arriving at it.

702 *Total Values of the Capital Stock of the Louisville & Nashville Railroad Company.*

Affiant says that the amount of $262,252,566.00, claimed by the Board to have been adjudged and determined by it as the fair cash value of the total capital stock of the Louisville & Nashville Railroad Company was arrived at by the Board according to the following calculations:

Gross corporate income of the Louisville & Nashville Railroad System, as shown by Report to Kentucky Railroad Commission and to Interstate Commerce Commission (p. 39)		$18,052,905.12.
Deduct for income of roads operated for account of owners, whose earnings are not available to the Louisville & Nashville Railroad Company, to-wit:		
South & North Alabama	$1,401,708.00	
Glasgow Railway	31,847.00	
Elkton & Guthrie Railroad Company	6,049.00	
Total		1,439,604.00.
Balance		16,613,301.00.
"Deduct income from non-taxable securities (see Report to Railroad Commission, p. 39, see Report to Auditor)		878,147.00
Balance		15,735,154.00
Total value of capital stock of L. & N. R. R. arrived at by capitalizing net income at 6%		262,252,566.00"

703 Affiant says that in the deduction from income from non-taxable securities made by the Board in said calculations, the Board failed to deduct income from securities of the Lexington & Eastern Railway, amounting to $70,953.33, and that the income from said securities was included in the said gross corporative income of $18,052,905.00 used by the Board in said calculations. The Lexington & Eastern Railway Company is a Kentucky corporation, its lines are located within the State of Kentucky, it was separately taxed in the State of Kentucky, and paid all of the taxes due by it to the State of Kentucky, both as to its tangible and as to its intangible properties, and the Louisville & Nashville Railroad Company owned when said income was collected and now owns all of the capital stock of the Lexington & Eastern Railway Co.

Affiant further says that the amount of $878,147.00 is not shown as the income from non-taxable securities in either the report to the Railroad Commission, p. 39, or in the report to the Auditor referred to by the Board in its Report and Order. And affiant says that said amount of $878,147.00 is made up as follows:

Rent of Paducah & Memphis Division	$206,506.20
Rent of that part of the Clarksville & Princeton branch which is leased to the Illinois Central	12,039.70
Dividend on stock of the Kentucky Public Elevator Company	1,680.00
Dividend on stock, Chicago, Indianapolis & Louisville Railway Company	236,830.12
Dividend on stock, Nashville, Chattanooga & St. Louis Railway Company	430,656.00
704 Dividend on stock, Central Transfer Railway and Storage Company	1,000.00

Dividend on stock, Lexington Union Station Company	1,000.00
Results from operation of Morganfield & Atlanta Railroad	31,828.73
Total	$921,540.75
Deduct:	
Deficit, Madisonville, Hartford & Eastern Railroad Company	43,393.38
Remainder	$878,147.37
or, dropping the odd cents we have the amount deducted by the Board as income from non-taxable securities..	$878,147.00.

Affiant further says that although the Board reduced the amount to be deducted for income from non-taxable securities by the amount of $43,393.38, for the deficit in the operations of the Madisonville, Hartford & Eastern Railroad, and thereby arrived at a greater total value of the capital stock of the Louisville & Nashville Railroad Company than it would otherwise have arrived at, the Board included the mileage of the Madisonville, Hartford & Eastern Railroad as mileage in Kentucky in arriving at the percentage of 35.15% used by it in apportioning to Kentucky its share of the total value of the capital stock. That is to say, although the Board treated the Madisonville, Hartford & Eastern Railroad as operated mileage for the purpose or with the result of inflating the percentage apportionable to Kentucky, the Board excluded the results of operation of that road with the purpose or result of increasing the total
705 value of capital stock which was apportioned.

Affiant further says that if the income from the securities of the Lexington & Eastern Railway Company, amounting to $70,953.33, had been included in the deduction of income from non-taxable securities, the total value of the capital stock of the Louisville & Nashville Railroad Company, arrived at by the Board by capitalizing what it claimed to be net income at 6%, would have been reduced by the amount of $1,183,666.67.

Affiant further says that the Board also failed to include in said deduction for income from non-taxable securities the amount of the income or profit arising from the Wasioto & Black Mountain Railroad proper, which was $15,154.59. The amount of said income of $15,154.59 was included in said amount of gross corporate income of $18,052,905.12 used by the Board in its calculations. The entire capital stock of said Wasioto & Black Mountain Railroad is owned by the Louisville & Nashville Railroad Company, and said Wasioto & Black Mountain Railroad is separately taxed and pays all its taxes due in the State of Kentucky.

Affiant says that this item was shown by him to the Board in the hearing had before it with respect to the assessment of the franchise of the Louisville & Nashville Railroad Company, and appeared in a statement which he filed with said Board and which was marked "Exhibit Geo. W. Lamb No. 5."

Affiant says that if the income from the Wasioto & Black Mountain Railroad proper had been deducted by the Board in its
706 calculations, the total value of the capital stock of the Louisville & Nashville Railroad Company, as arrived at by it, would have been reduced in the amount of $252,576.50.

Affiant further states that the benefit to the Louisville & Nashville Railroad Company arising from the ownership of stocks held by it in other companies which are separately taxed in the State of Kentucky is reflected not only in the dividends from said stocks or in the earnings of the particular lines covered by said stock, but also in the increased earnings and income of other portions of the Louisville & Nashville System arising from the affiliation with said System of the properties represented by said stocks. And affiant says that said increased earnings or income items of other portions of the Louisville & Nashville System arising from the affiliation with said system of the properties represented by said stocks are included in said amount of gross corporate income of the Louisville & Nashville Railroad System of $18,052,905.12, used by the Board in its said calculations but no deduction for said increased earnings or income items was made by the Board.

Affiant says, for example, traffic originating or terminating on the Nashville, Chattanooga & St. Louis Railway, or reaching the lines of the Louisville & Nashville Railroad by way of the Nashville, Chattanooga & St. Louis Railway, passes over the Main Stem of the Louisville & Nashville Railroad between Louisville, Ky., and Nashville, Tenn., and passes also over other divisions of the Louisville & Nashville System,
707 both in the State of Kentucky and elsewhere, and the net earnings of said traffic over said divisions of the Louisville & Nashville Railroad Company are included in said corporate income of $18,052,905.12. Affiant has made an investigation of the profits arising on the Louisville & Nashville Railroad System from traffic so originating or terminating on the Nashville, Chattanooga & St. Louis Railway, or reaching the lines of the Louisville & Nashville Railroad by way of the Nashville, Chattanooga & St. Louis Railway, which are included in said gross corporate income of $18,052,905.12 used by the Board in its calculation; and affiant says that for the fiscal year ended June 30, 1912, for which said gross corporate income was stated, the business so interchanged with the Nashville, Chattanooga & St. Louis Railway was handled both in what are known as "junction settlements" and on what is known as "interline billing." That is, both by rebilling and settling at junction points and by billing through from origin on the one road to destination on the other road and settling in Auditors' offices and affiant says that when capitalized at 6% the net income accruing to the Louisville & Nashville Railroad Company from business interchanged with the Nashville, Chattanooga & St. Louis Railway Company as aforesaid, on interline billing alone, which net income was included in said corporate income of the Louisville & Nashville Railroad System of $18,052,905.12, amounted in property value to more than $8,600,000.00.

And affiant says in the same connection that while there was no income in the way of dividend directly declared on the stock
708 of the Elkton & Guthrie Railroad Company there was included in said gross corporate income of $18,052,905.12, in addition to the income of $6,049.00 directly apportioned to the Elkton & Guthrie Railroad Company and deducted by the Board as earnings not available to the Louisville & Nashville Railroad Company, earnings over the lines of the Louisville & Nashville Railroad Company from traffic originating or terminating on the Elkton & Guthrie Railroad for which no allowance or deduction was made by said Board to account for the stock ownership of the Louisville & Nashville Railroad Company in the Elkton & Guthrie Railroad; and affiant says that when capitalized at 6% the net earnings available to the Louisville & Nashville Railroad Company, and included in said corporate income of $18,052,905.12, over and above the income of $6,049.00 for the Elkton & Guthrie Railroad deducted by the Board, amounted in property value to more than $120,000.00.

Affiant further says that the said Board in said calculations made no deduction for income from non-taxable securities of the Louisville, Henderson & St. Louis Railway; that the Louisville & Nashville Railroad Company owns stock in the Louisville, Henderson & St. Louis Railway of the book value of $519,788.73; that the Louisville, Henderson & St. Louis Railway is separately taxed in the State of Kentucky and pays all of the taxes due by it to the State of Kentucky as a separate corporation; that there are included in said gross corporate income of $18,052,905.12 used by said Board in said calculations, net earnings from traffic originating or terminating
709 on, or interchanged with the Louisville, Henderson & St. Louis Railway, which, when capitalized at 6% represent a property value of more than $1,535,000.00.

Affiant further says that said Board in said calculations not only failed to deduct as aforesaid as income from non-taxable securities the amount of the income or profit arising upon and particularly assigned to the Wasioto & Black Mountain Railroad of $15,154.59, but the Board also failed to deduct or consider the earnings on other divisions of the Louisville & Nashville Railroad Company arising from traffic originating or terminating on the Wasioto & Black Mountain Railroad, which earnings on other divisions were included in said amount of gross corporate income of $18,052,905.12 used by the Board in its said calculations, and affiant says that the net earnings on the Louisville & Nashville Railroad lines other than the Wasioto & Black Mountain Railroad, arising from business originating or terminating on the Wasioto & Black Mountain Railroad, and included in said gross corporate income of $18,052,905.12, amount, when capitalized at 6% per annum, to a property value of more than $1,142,000.00.

And affiant further says that the book values of the stocks owned by the Louisville & Nashville Railroad Company in corporations which are separately taxed in the State of Kentucky, and which pay taxes on all of their property of every kind in the State of Kentucky, which book values are included in the total values of the

capital stock, or entire properties of the Louisville & Nash-
710 ville Railroad Company amount to $30,761,799.35; and affiant further says that he heard and has read the record of the testimony with respect to the real values of these stocks given before the Board of Valuation and Assessment in the hearings concerning the assessment of the franchise of the Louisville & Nashville Railroad Company for taxation for the year 1913, and that he has compiled the results of that testimony, which was given by Mr. W. L. Mapother, First Vice President of the Louisville & Nashville Railroad Company, and that the real values of said stocks as shown by said testimony, as compiled by affiant, amount to more than $33,743,900.

And affiant further says that since hearing and compiling the results of said testimony he has himself made investigations with respect to the benefit to the Louisville & Nashville Railroad Company of its ownership of said stocks, and as so measured he is of the opinion that the values of those stocks included in the total value of the capital stock of the Louisville & Nashville Railroad Company amount to at least $33,743,900.00, and that they certainly amount to more than the book value, or to more than ..... $30,761,799.35.

Affiant says that the result of the capitalization at 6% of $878,147.00, the amount of income deducted by the Board in its said calculations for non-taxable securities, represents a property value of $14,635,783.33 and affiant accordingly says that in making its deductions for non-taxable securities the Board
711 deducted far too little, and that its error in this regard amounted to more than..... $16,126,016.00

Affiant further states that neither the operating expenses nor any other accounts used in arriving at the so-called net earnings, or corporate income of $18,052,905.12 used by said Board in said calculations, include any allowance for insurance of the maintenance of the Louisville & Nashville Railroad's income for the future, and that in view of this fact, and in view of the uncertainty and the risk attending the operations of railroads in the territory traversed by the lines of the Louisville & Nashville Railroad Company, it is not fair and proper to capitalize the income of that company at so low a percentage as 6% in order to arrive at the value of that company's property.

Affiant further says that said corporate income of $18,052,905.12 was earned in large part upon lines located in States in which the legal rate of interest for investments with absolute security is greater than 6%, and affiant gives examples as follows:

In the State of Alabama the legal rate of interest is 8%, and in that State the Louisville & Nashville Railroad Company operates, owns, leases and controls, 1,555.11 miles of railroad which contributed to said gross corporate income of $18,052,905.12.

In the State of Florida the legal rate of interest is 8%, and in that State the Louisville & Nashville Railroad Company operates, owns,

leases or controls 246.48 miles of railroad, which contributed to said corporate income of $18,052,905.12.

712 In the State of Georgia the legal rate of interest is 7%, and in that State the Louisville & Nashville Railroad Company operates, owns, leases or controls 786.10 miles, which contributed to said corporate income of $18,052,905.12.

Affiant says that he has particularly considered and studied the returns on investments and the risk in the railroad business as compared with the return on investment and the risk in other classes of business in the territory through which the Louisville & Nashville Railroad Company operates its lines; and affiant says that in view of the risks of the railroad business the percentage used in capitalizing income for the purpose of arriving at the value of the capital stock of a railroad company for taxation purposes should not be less than 8%.

Affiant further says that on the basis of capitalization of income at 8% the total value of the entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the state of Kentucky, including the values of properties which are separately taxed in the State of Kentucky, and which are represented by stocks held by plaintiff is not more than $202,514,384.38

Affiant further says that the par value of the capital stock of the Louisville & Nashville Railroad Company during the fiscal year ended June 30, 1912, and at the end of that fiscal year was..... 60,000,000.00

and that the average market value per share of stock of the Louisville & Nashville Rail-

713 road Company during said fiscal year as per quotations on the New York Stock Exchange was 152.0825

and that the total market value of the capital stock of the Louisville & Nashville Railroad Company on that basis was..... 91,249,500.00

Affiant further says that the outstanding bonded debt of the Louisville & Nashville Railroad Company as of June 30, 1912, was of par value of.... 136,785,792.84

and that the average market value of those bonds was 135,785,792.84

and that he arrived at said average market value by taking for each series of bonds for which quotations were available, the high and low prices for each week on the New York Stock Exchange, as reported in the Commercial & Financial Chronicle, and dividing the sums of the quotations, high and low, by the number of quotations, 104, and that in cases where no quotations were given, the par value of the bonds was used.

Affiant further says that the total par value of said capital stock and outstanding bonds was.... 196,078,500.00

and that the total market value of said stock and bonds was 227,035,292.84

Affiant further says that the values of said stock and bonds include all of the property of the Louisville & Nashville Rail-
714 road Company, tangible and intangible, wherever situated, that said values include not only railroad mileage, but also the value of terminals and other properties not represented in the operated mileage, and that said values include not only the company's interest in its operated mileage, but also its interest in all mileage whether operated, owned, leased or controlled.

Distribution of Total Values Between Kentucky and Other States.

Affiant further says that the percentage used by said Board of Valuation and Assessment in apportioning to Kentucky its share of the capital stock of the Louisville & Nashville Railroad Company, 35.15% is not the proportion which the mileage, or length, or lines operated, owned, leased or controlled by the Louisville & Nashville Railroad Company in the State of Kentucky bears to the total length of the lines operated, owned, leased or controlled by the Louisville & Nashville Railroad Company in the State of Kentucky and elsewhere, but is merely the proportion which the mileage operated by the Louisville & Nashville Railroad Company in Kentucky less mileage operated by it for account of others in Kentucky, bears to the total mileage operated by the Louisville & Nashville Railroad Company in Kentucky and elsewhere, less the mileage operated by it for account of others in Kentucky and elsewhere.

Affiant further says that the following statements shows the mileage operated by the Louisville & Nashville Railroad
715 Company, as of June 30, 1912, divided as between mileage in the State of Kentucky and mileage outside of the State of Kentucky, but said statement does not include mileage owned, leased or controlled, but not operated by the Louisville & Nashville Railroad Company; and affiant draws attention to the fact that in order to arrive at the percentage of 35.15% used by the Board of Valuation and Assessment in its said calculations, it is necessary to deduct mileage operated, but operated for account of owners:

	Total.	In Kentucky.	Outside of Kentucky.
Owned and Operated	3,498.63	1,217.44	2,281.19
Operated as Owner of Entire Capital Stock	632.05	334.33	297.72
Operated under Lease	118.97	.....	118.97
Operated under Trackage Arrangement	217.04	16.24	200.80
Owned, Leased, Operated under Trackage Arrangement	5.46	.....	5.46
Owner of Entire Capital Stock, Property Operated Separately, Operated by Plaintiff under Trackage Arrangement	6.46	6.46	.....
Operated for Account of Owners...	221.88	21.42	200.46
Total Mileage Operated.....	4,700.49	1,595.89	3,104.60
Deduct: Operated for Account of Owners	221.88	21.42	200.46
	4,478.61	1,574.47	2,904.14

Affiant says that the 1,574.47 miles so arrived at as the mileage operated in Kentucky, less mileage operated for account of other owners in Kentucky is 35.15% of 4,478.61 miles so arrived at as the total mileage operated in Kentucky and elsewhere less the mileage operated for account of other owners in Kentucky and elsewhere.

716

Affiant further says that the total mileage in Kentucky above shown, 1,574.47, which it is necessary to use in order to arrive at the percentage of 35.15% used by the Board in its said calculations, includes mileage of roads separately taxed in the State of Kentucky as follows:

Morganfield & Atlanta Railroad	25.33	miles
Madisonville, Hartford & Eastern R. R.	55.49	"
Wasioto & Black Mountain Railroad	70.05	"
Kentucky Highlands Railroad—Millville to Cliffside..	6.46	"
Total	157.33	"

Affiant further says that if this mileage of roads separately taxed in the State of Kentucky is eliminated from the operated mileage, as well as the mileage operated for account of owners, which was eliminated by the Board in arriving at its said percentage of 35.15%, the proportion of mileage operated by the Louisville & Nashville Railroad Company in Kentucky to the total mileage operated by the Louisville & Nashville Railroad Company in Kentucky and elsewhere, less mileage operated for account of other owners, is 32.79%

Affiant further says that the total mileage of all kinds operated by the Louisville & Nashville Rail-

road Company in Kentucky, as of June 30, 1912, was ..... 1,595.89 miles
717 and that the total mileage of all kinds operated by the Louisville & Nashville Railroad Company, as of said date, within and without Kentucky, was ..... 4,700.49 miles
and that the percentage of mileage operated in Kentucky to total mileage operated in Kentucky and elsewhere, was 33.95%

Said operated mileage of 4,700.49 miles did not include mileage owned, leased or controlled by the Louisville & Nashville Railroad Company, but not operated by it, but said total operated mileage of 4,700.49 miles, as well as said operated mileage in Kentucky of 1,595.89 miles, did include mileage of the Morganfield & Atlanta Railroad, the Madisonville, Hartford & Eastern Railroad, the Wasioto & Black Mountain Railroad, and the Kentucky Highlands Railroad (Millville to Cliffside), which roads are separately taxed in the State of Kentucky, and which mileage amounted to a total of ..... 157.33 miles
as shown by the statement hereinabove set forth, and said mileage in Kentucky of 1,595.89 miles also included the mileage of the Elkton & Guthrie Railroad and of the Glasgow Railway, which are also separately taxed in Kentucky, and the mileage of these two railways amounted to ..... 21.42 miles
and the total mileage of roads separately taxed in Kentucky, which was included in said mileage in Kentucky of 1,595.89 miles, was..... 178.75 miles
718 and this mileage of 178.75 miles is also included in the total operated mileage of 4,700.49 miles. And affiant says that eliminating the mileage separately taxed in the State of Kentucky from the total operated mileage of the Louisville & Nashville Railroad Company, the total mileage operated by said company, within and without the State of Kentucky, was, as of June 30, 1912.. 4,521.74 miles
and the total mileage operated by said company within the State of Kentucky, as of said date, was.. 1,417.14 miles
and the percentage of mileage so operated in the State of Kentucky to the total mileage operated in Kentucky and elsewhere, was..... 31.3405%

Affiant further says that the proportion which the length of the lines operated, owned, leased or controlled by the Louisville & Nashville Railroad Company in Kentucky bears to the total length of the lines operated, owned, leased or controlled by that company in Kentucky and elsewhere is 24.6901%
and that detailed distribution of said mileage by separate lines, divisions and branches is correctly set forth in paragraph I of the Bill

of Complaint brought by the Louisville & Nashville Railroad Company in this case.

719 Affiant says that the Board of Valuation and Assessment, in using operated mileage for the purpose of arriving at the percentage of 35.15%, used by it in apportioning a part of the total capital stock of the Louisville & Nashville Railroad Company to the State of Kentucky, not only eliminated or omitted the mileage operated for account of owners within and without the State of Kentucky, as heretofore explained by affiant, but also omitted the following lines owned, leased or controlled by the Louisville & Nashville Railroad Company in Kentucky or elsewhere:

	Total.	In Kentucky.
Nashville, Chattanooga & St. Louis Railway.	925.01	8.23
Central Transfer Railway & Storage Company	.67	.67
Georgia Railroad and Dependencies	571.00	.....
Chicago, Indianapolis & Louisville Railway	616.60	.....
Louisville, Henderson & St. Louis Railway	181.44	181.44
Lexington & Eastern Railway	96.11	96.11
New Orleans, Mobile & Chicago Railroad.	547.06	.....
Total controlled by Louisville & Nashville Railroad Company, operated under separate organizations	2,937.89	286.45
Paducah & Memphis Division—Owned but not operated	248.74	49.40
720 Clarksville & Princeton Branch—Gracey to Princeton, Ky.—Owned but leased to the Illinois Central Railroad	20.71	20.71
Total	3,207.34	356.56

Affiant further says that the amount of corporate income of $18,052,905.00 used by the Board of Valuation and Assessment in arriving at or estimating the total value of the capital stock of the Louisville & Nashville Railroad, includes net income arising from business originating or terminating on lines owned, operated, leased or controlled by the Louisville & Nashville Railroad Company, whose mileage was not included or considered by said Board, and that this business so originating or terminating on said lines not included, passed over the lines operated by the Louisville & Nashville Railroad Company and resulted in net income or earnings on and from the operated mileage of the Louisville & Nashville Railroad Company.

And affiant further says that in like manner, said corporate income of $18,052,905.00 used by the Board in its calculations, included net earnings or income accruing on the lines operated by the Louisville & Nashville Railroad Company for its own account, but

arising from business originating or terminating on lines operated for account of owners, the mileage of which lines operated for account of owners was not included or considered by the Board. For example, the said corporate income of $18,052,905.00 includes net earnings accruing on mileage operated by the Louisville &
721 Nashville Railroad Company for its own account, but arising from business originating or terminating on the South & North Alabama Railroad, and these net earnings arose and accrued to the Louisville & Nashville Railroad Company from the affiliation and connection of the South and North Alabama Railroad as a part of the Louisville & Nashville System. Affiant says that the net benefit accruing to the Louisville & Nashville Railroad Company from said affiliation of the South & North Alabama Railroad and from business interchanged with it, which is included in said amount of $18,052,905.00, was at least $995,423.79
and affiant says that the net benefits included in said amount of corporate income of $18,052,905.00, and arising from the affiliation of the Glasgow Railway and of the Elkton & Guthrie Railroad, were respectively, at least 43,864.49
and 7,533.66
and that the benefit arising on the mileage operated by the Louisville & Nashville Railroad Company for its own account, and included in said corporate income of $18,052,905.00, which resulted from the affiliation with and interchange of business with the South & North Alabama Railroad, Glasgow Railway and Elkton & Guthrie Railroad, was at least.. 1,046,821.94
and affiant says that when capitalized at 6% said net benefit of which no account or considera-
722 was taken or given by the Board, represents a property value of over ..... 17,447,000.00.

Affiant further says that an apportionment of the total value of the capital stock of the Louisville & Nashville Railroad, or the value of all of its property, tangible and intangible, wherever situated, on basis of operated mileage alone would be unreasonable and illogical, whether such total values are arrived at on the basis of the values of stock and bonds or on the basis of capitalization of income. Affiant says there is no logical relevancy between either the income claimed to have been considered by the Board for the purpose of capitalizing to find total values or the total value of the stock and bonds of the Louisville & Nashville Railroad Company on the one hand and the operated mileage alone on the other; and affiant states, as follows, some of the reasons why it is not proper to apportion the total values shown in the reports claimed to have been considered by the Board on basis of operated mileage alone:

1. Both the amounts of income stated and the values of stocks and bonds shown in the report to the Auditor of Public Accounts, and in the reports made by the Louisville & Nashville Railroad Company to its stockholders, covered lines not operated, such, for ex-

ample, as the income and the stock and bond values representing the Nashville, Chattanooga & St. Louis Railway, the Georgia Railroad and Dependencies, the Chicago, Indianapolis & Louisville Railway, the Louisville, Henderson & St. Louis Railway, the
723 Paducah & Memphis Division, and that part of the Clarksville & Princeton Branch from Gracey to Princeton, Ky.

2. An apportionment on the basis of operated mileage alone would exclude the results of operation of such roads as the Georgia Railroad and Dependencies, which directly and intimately affect the tangible and intangible values of the Louisville & Nashville Railroad Company.

3. An apportionment on basis of operated mileage alone would include property not owned in fee, such as, the Morganfield & Atlanta Railroad, the Madisonville, Hartford & Eastern Railroad, the Maysville & Lexington Railway, the Owensboro & Nashville Railroad, the Pine Mountain Railway, the Nashville & Decatur Railroad, and would exclude mileage owned in fee such as the Paducah & Memphis Division, and that part of the Clarksville & Princeton Branch from Gracey to Princeton, which is operated by the Illinois Central.

4. An apportionment on operated mileage basis of total values would result in bringing into Kentucky for taxation intangible and tangible values arising from lines and terminals owned and controlled in other States, which values are not represented in the operated mileage.

5. An apportionment on operated mileage would result in double taxation of roads operated by the Louisville & Nashville Railroad Company, but separately taxed in the State of Kentucky, such as the Madisonville, Hartford & Eastern Railroad, the Morganfield & Atlanta Railroad, the Kentucky Highlands Railroad, and the Central Transfer Railway and Storage Company.

724 And affiant says that although the Board of Valuation and Assessment of the State of Kentucky claims to have assigned or apportioned to the State of Kentucky a part of the total value of the capital stock of the Louisville & Nashville Railroad Company on the "mileage basis," the said Board did not make such apportionment on a basis either of mileage operated or on basis of mileage operated, owned, leased or controlled; and affiant says that the error made by the Board in this regard is the difference between the so-called mileage percentage used and considered by the Board 35.15%
and the correct percentage which represents the proportion which the length or mileage of the lines of the Louisville & Nashville Railroad Company operated, owned, leased or controlled in Kentucky bears to the total length or mileage of the lines operated, owned, leased or controlled by the Louisville & Nashville Railroad Company in Kentucky and elsewhere, and affiant says that this mileage proportion is ..... 24.6901%.

Affiant further says that the mileages set forth in paragraph I of the Bill of Complaint of the Louisville & Nashville Railroad Company in this case agree with the mileages shown in the report of the Louisville & Nashville Railroad Company to its stockholders for the fiscal year ended June 30, 1912, and with the report to the Auditor of Public Accounts of the State of Kentucky, with the elimination of forty (40) miles of the Frankfort & Cincinnati Railway, which the Court of Appeals of Kentucky has held can
725 not be owned and lawfully operated by the Louisville & Nashville Railroad Company, and which railroad is now separately operated and separately taxed in the State of Kentucky.

Tangible Values Inside and Outside of the State of Kentucky.

Affiant says that there is located outside of the State of Kentucky tangible property of the Louisville & Nashville Railroad Company amounting to at least	$130,917,782.15
and that the value of the tangible properties of the Louisville & Nashville Railroad Company both within and without the State of Kentucky amounts to at least	178,927,902.15

Arbitrary Addition to Amount Apportioned by the Board to the State of Kentucky.

Affiant further says that he is familiar with all the testimony and records presented to the Board and claimed to have been considered by it in its assessment of the franchise of the Louisville & Nashville Railroad Company for taxation in Kentucky for the year 1913, and that the addition of $2,318,224.00 made by the Board to the amount of $92,181,776.00 previously apportioned by it to the State of Kentucky is not, and can not be, based upon any calculation, or investigation, or record used by, or presented to, or claimed
726 to have been considered by said Board, and affiant says that it is clear from a consideration of all the matters claimed to have been considered by the Board in its said Report and Order, that the addition of $2,318,224.00 was merely an arbitrary and capricious addition made merely for the purpose of bringing the amount of $92,181,776.00 up to the even amount of $94,500,000.00.

And with reference to certain calculations set forth by the Board in its Opinion and Order alleged to have been based upon a consideration of the proportion of gross or net income from Kentucky as compared with the total gross or net income of the System, affiant says that none of the facts shown to the Board at the hearing before it with respect to the assessment of the franchise of the Louisville & Nashville Railroad Company for taxes for the year 1913, and none of the facts or reports claimed by the Board to have been considered by it afforded any knowledge or information sufficient to enable the

Board to determine what were either the gross earnings or net earnings of the Louisville & Nashville Railroad Company within the State of Kentucky, and affiant says that said Board did not, at the time of making its assessment, and it has not now, any knowledge or information sufficient to enable it to determine or approximate what were the gross earnings or net earnings of the Louisville & Nashville Railroad Company within the State of Kentucky.

And with reference to the claim of the said Board of Valuation and Assessment of Kentucky, that it considered in this con-
727 nection the annual report made by the Louisville & Nashville Railroad Company to the Kentucky Railroad Commission, for the fiscal year ended June 30, 1912, affiant says that it was shown without contradiction to said Board by him in the hearing before it, and it is true, that the amounts of gross earnings and the amounts of net earnings shown in said report to the Kentucky Railroad Commission are the results of arbitrary apportionments, both of earnings and expenses, and the amounts of gross earnings in Kentucky, and the amounts of net earnings in Kentucky of the Louisville & Nashville Railroad Company shown in said report to the Kentucky Railroad Commission, are not reliable for the purpose for which the Board claims to have used such amounts, and affiant says that said report to the Kentucky Railroad Commission, with respect to both gross earnings of the Louisville & Nashville Railroad Company in Kentucky, and of net earnings of the Louisville & Nashville Railroad Company in Kentucky, is of no value for assessment or valuation purposes, and it is of no value in arriving at the amounts of the Louisville & Nashville Railroad Company's gross or net earnings in the State of Kentucky, or the relative amounts of such earnings as compared with the amounts of gross or net earnings of the Louisville & Nashville Railroad Company over its entire System.

Affiant further says that neither the gross earning in said report to the Railroad Commission of Kentucky nor the net earnings or expenses in said report to the Railroad Commission of Ken-
728 tucky, which report said Board claims to have considered, were intended to be used for assessment purposes by said Board but said reports were made for the purpose of comparison between the results of operations for the fiscal year ended June 30, 1912, and the results of operations of previous years, and said reports are not accurate statements of the gross or net earnings of the Louisville & Nashville Railroad Company, nor were they intended so to be, and affiant says that all this was fully explained in his testimony at the hearing before said Board concerning the assessment of the Louisville & Nashville Railroad Company's franchise for 1913.

And affiant refers in this connection, to the report of his testimony before the State Board of Valuation and Assessment which appears at pages 225 to 231, inclusive, of the transcript of the proceedings before the State Board of Valuation and Assessment, which has been filed as "Exhibit A" with the Bill of Complaint in this case.

Comparisons of Real Values and Assessed Values in the State of Kentucky.

Affiant says that the report of the United States Census for 1890, pages 14 and 59, shows that the percentage of assessed valuation to true valuation of real and personal property taxed in the State of Kentucky declined from 96.60% in 1850 to 46.71% in 1890, and affiant showed this fact to the Board of Valuation and Assessment in the hearings before it as set forth in his Exhibit Geo. W.
729 Lamb, No. 25, which is filed as part of "Exhibit A" with the Bill in this case.

Affiant further states that according to Tables 15 and 16 of the Special Report on Wealth, Debt and Taxation, issued by the Census Bureau in 1907, the percentage of assessed value to estimated true value of property subject to ad valorem taxation in the State of Kentucky had declined to 45.09% by 1904, and this fact was shown to the Board of Valuation and Assessment in the hearings before it and was set forth in a statement filed by affiant with said Board, marked "Exhibit Geo. W. Lamb, No. 26," and a copy of this exhibit as filed by him appears as part of "Exhibit A" filed with the Bill in this case.

And for ready reference, affiant gives as follows the ratio of assessed value to estimated true value of real and personal property taxed in the State of Kentucky, including railroads, street railways, telegraph and telephone systems, privately owned water works and privately owned central electric light and power stations, at 10-year periods from 1850 to 1900, inclusive, and for 1904, as shown by pages 40 and 41 of the Special Report on Wealth, Debt and Taxation of the Census Bureau for 1900, and by pages 14 and 59 of the Special Report on Wealth, Debt and Taxation of the Census Bureau for 1890:

1850	96.60%
1860	79.30%
1870	67.77%
1880	41.10%
1890	46.71%
1900	47.7 %
1904	45.9 %

730 And affiant showed these facts to said Board in said hearing before it in a statement which he filed with said Board marked "Exhibit Geo. W. Lamb, No. 27," a true and correct copy of which exhibit is filed as part of "Exhibit A" with the Bill of Complaint in this case.

Affiant says that the comparisons given for the year 1904 were the latest comparisons available from the reports of investigations made by the United States Census Bureau, but that he himself made later comparisons between real values and assessed valuations in connection with the consideration of the work of the State Board of Equalization for 1913. In making such comparisons affiant

compared the assessed values as equalized by said State Board of Equalization for 1913 with the real values as reported in a Bulletin of the 13th Census of the United States for 1910; and affiant says that it is commonly known that the real values of property in Kentucky for 1913 were greater than the real values of property in Kentucky for 1910, and that, therefore, the percentages of assessed value to real values shown as a result of his comparisons of the assessments and equalizations for 1913 with the real values for 1910 were higher percentages than would be shown by a comparison of the assessed values for 1913 with the real values for the same year.

Affiant says that his investigation showed with respect to tracts of land with improvements, line 15 of the Report of the Board of Equalization, an equalized value of $355,285,669, as compared with the real value of farm lands and buildings shown by
731 the Census of the United States for 1910 of $635,459,372, and that with respect to this item the percentage of equalized values for 1913 to the real value as shown by the Thirteenth Census Report for 1910 was 55.9%.

Affiant says that the equalized value of thoroughbred or standard stallions, geldings, mares and colts, stallions of common stock, geldings, mares and colts of common stock, mules and mule colts, jacks, jennets, thoroughbred or standard bulls, cows and calves, bulls, cows and calves and steers of common stock, and sheep and hogs, as fixed by the Board of Equalization for 1913, as shown by lines 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42 and 44 of its report was $57,318,478, as compared with the real value for such live stock for 1910, as shown by the Bulletin of the Thirteenth Census of the United States of $117,486,662, and that the percentage of equalized value for 1913 to the real value for 1910 was 48.8%.

Affiant further says that the equalized value for 1913, as shown by lines 45 and 49 of the Report of the State Board of Equalization of Agricultural Implements, Wagons, Carriages, Bicycles and Vehicles of Every Kind, was $8,921,889, as compared with a real value for 1910, as shown by the United States Census of farm implements and machinery alone of $20,851,846. The equalized value for 1913, with respect to these items, was only 42.8% of the real value for 1910, and the real value does not include automobiles and other vehicles not used on farms.

Affiant says further that the Bulletin for the Thirteenth Census of the United States, which he has heretofore referred to,
732 was a Bulletin relating mainly to agricultural statistics for the State of Kentucky, and that while that Bulletin shows separately the value of farm lands and the value of buildings on farm lands, it does not show separately the value of city or town lots with improvements or other real estate, but affiant is able to make a rough comparison of the equalized and real values of all taxed real property and improvements as follows:

From the Report of Wealth, Debt and Taxation, issued by the Census Bureau in 1907, and specifically from Table III, page 16 of said report, it appears that the total value of farm lands and

improvements taxed was 52.872% of the total value of all taxed real property and improvements, and estimating that the increase in value for city and town lots with improvements was relatively the same as the increase in value of tracts of lands with improvements, it is apparent that the value of all taxed real property and improvements, as of 1910, may be roughly approximated by assuming that the value of tracts of lands and improvements, $635,459,672, shown by the Bulletin of the Thirteenth Census of the United States referred to, is 52.872% of the value of all taxed real property and improvements, and upon this assumption the true value of all taxed real property and improvements in Kentucky in 1910 was $1,201,882,607

and from lines 18 and 15 of the Report of the Board of Equalization for 1913, it appears
733 that the equalized value of all taxed real property and improvements was as follows:

18. Value of city or town lots with with improvements $292,318,046
15. Value of tracts of land with improvements 355,285,669

Equalized value of all taxed real property and improvements 647,603,715

from which it would appear that the equalized value of all taxed real property and improvements for 1913 was 53.882%

of the real value of said taxed real property and improvements in 1910 and was, therefore, a much smaller percentage of the real value of said property in the same year in which the equalization was made.

Affiant says that the total assessed value of personal property subject to taxation for 1913, as shown by the Report of the Board of Equalization..... $202,170,189

there was not subject to equalization, as shown by the Report of the Board of Equalization..... 83,931,799

leaving, subject to equalization..... 118,238,390

which last amount was equalized at..... 120,635,691

to which add amount not subject to equalization.... 83,931,799

and there is had, as the equalized value of personal property assessed or equaled by the State Board of Equalization 204,567,490

734 Of this last amount affiant has been able to compare the equalized values of livestock, agricultural implements and vehicles amounting to over 66,000,000

with the real values, as he has heretofore explained, leaving about 138,000,000

of the equalized value of personal property assessed or equalized by the State Board of Equalization for which no comparisons have been made.

And affiant further says that it is a matter of common knowledge in the State of Kentucky that personal property other than livestock and vehicles was and is either omitted from taxation or was and is assessed at a very small proportion of its real value.

And affiant says that of the general property tax collected in the State of Kentucky about 80% is equalized by the State Board of Equalization and that as result of investigations which he has made in this regard it clearly appears that property equalized by the State Board of Equalization is assessed and taxed and equalized at not more than 52% of its real value.

Affiant further says that he has investigated the assessments made for 1913 by the State Board of Valuation and Assessment of the franchises of corporations subject to its jurisdiction; and has compared the results of the calculations made by or on behalf of said Board and which appear or appeared in the envelopes on file in said Board's office with the final assessments made by said Board of certain corporations. Affiant says that the working
735 papers and calculations considered by him were certified to be true and correct copies of the working papers and calculations which appeared in the jackets, or envelopes in the Auditor's office, with respect to the assessments of the franchises of the several corporations considered for the year 1913, and that certification of said working papers and calculations was made by Chas. J. Veling, Chief Clerk of the Corporation Department in the office of the Auditor of Public Accounts, and Secretary of the Board of Valuation and Assessment.

Affiant says that the following is substantially a true and correct copy of the working papers which appeared in the envelope relating to the assessment of the franchise of the Cumberland Pipe Line Company for taxation for the year 1913, and of notations on the jacket relating to said company:

Cumberland Pipe Line Co.
As on Yellow Slip.

6) 107,139

1780000
80

1,424,000.0

$1,400,000 is an 80% Assessment.

As finally assessed and paid on July 16, 1913.

Jacket.

Total Capital	$800,000
Less tangible property	361,924
Franchise	438,076
Tax	2,190.38

Affiant further says that the item "107,139" refers to the net income of said Cumberland Pipe Line Company, incorpo-
736 rated, as reported in the report made by said company to the Auditor of Public Accounts of Kentucky, as of June 30, 1912, and that the calculations appearing on said working paper represent the process of capitalizing said net income at 6% and equalizing the result at 80% as is shown by notation on said working papers that "$1,400,000 is an 80% assessment."

Affiant says further that the final assessment made of the franchise of said Cumberland Pipe Line Company was based upon a valuation of the total capital stock of $800,000, which is 44.94% of the valuation of $1,780,000 arrived at by capitalizing the net income of said company, as reported to the Auditor of Public Accounts of Kentucky at 6%.

Affiant further says that the following is a copy of the working paper which appears in the jacket concerning the assessment of the franchise of the Louisville Gas Company for 1913 by the Board of Valuation and Assessment, and of the notations on said jacket with reference to the final assessment:

Louisville Gas Company.

Stock	3,600,000	
	120	
Asest.	720	
Should be	360	
$3,400,000	4,320,000	Market Value
	200,000	
	4,520,000	

737 Under the terms of the merger the city received 150 per share for its stock. The other holders the equivalent of $120.00.

21,752
216,000

6) 237,752

$4,500,000. 3,962,500
4,520,000

2) 8,482,500

4,241,250 Average Value
80

3,393,000.00
21,752 Int.
216,000 Div.

237,752
74,920 Credit

6) 152,832 Net

2,547,000
4,520,000 Stk. & Bond

2) 7,067,000

3,533,000 Average
80

2,826,400

4,520,000 Total Capital on basis of shares at 120 and bonds at par..... 4520 / 70 = 3,164,000

3,533 / 70 = 2,473,100
2,250
220.

3,160,000=70%.

738

As finally assessed and paid on July 19, 1913.....

(Jacket.)

Total Capital	$2,250,000
Less tangible property, etc.	732,175
Franchise	$1,517,825
Tax	7,589.13

Affiant says that said calculations show that the Board of Valuation and Assessment found the value of the total capital stock of the Louisville Gas Company on the stock and bond plan to be.. $4,520,000.00
and the value of the total capital stock arrived at by capitalizing at 6% the amount paid for interest and dividends alone to be..... 3,962,500.0
and that the Board found the value of the capital stock of the Louisville Gas Company by averaging the two values above stated to be..... 4,241,250.00
Affiant further says that the final assessment of the franchise of the Louisville Gas Company, made by the Board was based on an assessment of the total capital stock of said company at..... 2,250,000.00
which amount is 49.78% of the valuation of $4,520,000.00, arrived at on the stock and bond plan.

Affiant further says that the following are copies of memoranda and calculations appearing on working papers in the jacket or envelope in the office of the Auditor of Public Accounts with respect to the franchise of the Pullman Company for taxation
739 for the year 1913, and of notations on said jacket with reference to the final assessment made by the Board of Valuation and Assessment of the franchise of said company for said year:

Pullman Co.

Operating Car Rev.

12,719,552) 10,831,718.00 (85

10 175 641 6

656 076 40

85% of revenues of company are derived from operation of cars. Therefore that proportion of its entire capital must be employed as a common carrier.

Net Car Operating Revenues:

Less taxes 10,831,718
931,134

6) 9,900,584

165,000,000
.009

1,485,000 in Ky.

Stock and Bond Plan.

Mileage within and without Ky.:

216,969) 193 6000 (.009

195 0721

In report to Auditor Company state its stock is worth $105 per share. This a very low valuation on 8% stock.

740 On this basis 120,000 shares *is* worth

	105	
	600	
	120	
	126,000,000	Total Cap.
Deduct	18,000,000	Used in manufacture.
	108,000,000	
	.009	
	972,000 in Ky.	

Total Capital employed in business of company as shown by statement to Interstate Com. Commission:

	148,000,000	
Employed in Manf. Deduct.	22,200,000	
	125,800,000	
	.009	
	1,132,200 in Ky.	
	972,000 in Ky. Stock & Bond	
	1,485,000 in Ky. Cap.—Net Income	
3)	3,589,000	
	1,163,000	Average in Ky.
	80	
	932,400 in Ky.	

As finally assessed and paid on July 3, 1913.....

(Jacket.)	
Total Capital	$600,000
Less tangible property, etc.	241,265
Franchise	358,735
Tax	$1,793.68

741 The final assessment of the franchise of the Pullman Company made by the State Board of Valution and Assessment for 1913 was based upon a valuation of the total capital stock of that company in Kentucky of..... $600,000.00

Affiant says that the calculations on the working papers in the jacket pertaining to the Pullman Company show that the Board found the total capital stock

of the Pullman Company in Kentucky to be, on basis of capitalizing operating revenues at 6%..... 1,485,000.00
of which the assessed value of the total capital stock, $600,000.00, is about..... 40%
and the Board found the total value of the capital stock of the Pullman Company in Kentucky, on the stock and bond plan, with stock figures at $105 per share, to be 972,000.00
of which the assessed value, $600,000.00 is about..... 61%
but affiant says, as shown by notation on working paper made by the Board, $105 per share is a very low valuation on an 8% stock, and the market value of the capital stock of the Pullman Company on June 29, 1912, was $161 per share, on which basis the proportion of the value of the total capital stock assignable to Kentucky, after deducting $18,000,000.00 for capital used in manufacturing, is..... 1,576,800.00
742 of which the value assessed by the Board, $600,000.00, is 38.05%

Affiant further says that the other calculations appearing on working papers in the Pullman Company jacket show that the Board averaged the number of valuations for the Pullman Company and arrived at an average valuation of the total capital stock of said company in the State of Kentucky of..... 1,163,000.00
of which amount the final assessment of $600,000.00 made by the Board, is about..... 51%

Affiant further says the following is a copy of working sheet appearing in the jacket in the office of the Auditor of Public Accounts of the State of Kentucky relating to the assessment of the franchise of the Kentucky Traction and Terminal Company for taxation for the year 1913, and of notations on said jacket with reference to the final assessment of the franchise of said company:

Kentucky Tract. and Term. Co.

(As shown on Yellow Sheet.)
6) 129,883

2,164,700
8

1,731,760

743 The amended report of this company shows payment of interest in the above sum—but also shows a large deficit. There is no information in report as to the value of its stocks and bonds. It is probable the company is highly over capitalized—because of its over capitalization and the uncertain value of its stocks

and bonds—would suggest a tentative assessment of $1,311,080, an increase of 600,000.00 over last year.

As finally assessed and paid on August 8, 1913. (Jacket.)

Total Capital	$1,200,000
Less tangible property, etc.	711,080
Franchise	488,920
Tax	$2,444.60

Affiant says that according to the report of the Kentucky Traction & Terminal Company to the Auditor of Public Accounts, as of June 30, 1912, the operations of that company do not show a large deficit, but on the contrary, in order to show a deficit, said company charged up, and the Board allowed, as expenses $200,432.32 for enlargement of plant, and affiant says that such expenditures are not properly treated as operating or other expenses, but should be treated as additions to the capital account, and that such expenditures are so treated by the Louisville & Nashville Railroad Company in the reports made by it to said Board.

Affiant further says that the calculations made on said working paper relating to the Kentucky Traction & Terminal Company show that the Board capitalized amount of interest paid by the Kentucky Traction & Terminal Company at 6%, and on this basis found that the total value of its capital stock in the State of Kentucky was..... $2,164,700.00

744

of which amount the final assessment made by the Board of the total value of the capital stock of said company	1,200,000.00
was, and is.....	55.43%
and affiant says further that if the amount improperly charged to expenses as enlargement of plant.....	200,432.32
had not been so improperly charged, the deficit of..	91,183.26
improperly shown in the report of said Kentucky Traction & Terminal Company to the Auditor of Public Accounts of Kentucky, for the year ended June 30, 1912, would have shown instead a profit of..	109,249.06
and the capitalization of income as measured by interest paid, and by profits after paying interest at 6%, would be represented by the capitalization of	239,132.98
at 6%, which represents a total value of the capital stock of said company in Kentucky of over.....	3,985,000.00
of which the assessment made by the State Board of Valuation and Assessment $1,200,000.00, is about	30%

745 *Ascertainment of Value of Franchise of the Louisville and Nashville Railroad Company in Kentucky for Assessment for taxation in* 1913.

Affiant further says that Kentucky's proportion of the value of the Louisville & Nashville Railroad Company's franchise, or intangible property for taxation for the year 1913 is not over.....	$2,569,586.31
and says further that this amount is arrived at according to the following calculations:	
Total value of entire properties, tangible and intangible, of the Louisville & Nashville Railroad Company, within and without the State of Kentucky, as arrived at on the stock and bond plan..	$227,035,292.84
Deduct—For value of securities which are separately taxed in the State of Kentucky, included in above values which securities separately taxed are worth at least.....	30,761,799.35
	$196,273,493.49
Deduct—For tangible properties within and without the State of Kentucky as follows:	
Tangible properties within the State of Kentucky upon the assumption that the assessed value of $28,806,072, excluding properties separately taxed, is 60% of the real value $48,010,120.00	
746 Tangible values without the State of Kentucky, as shown to the Board of Valuation and Assessment in an exhibit filed with it and marked "Exhibit Geo. W. Lamb No. 3" amounted at least to..... 130,917,782.15	
Value of tangible properties within and without the State of Kentucky to be deducted.....	178,927,902.15
Leaving value of the Louisville & Nashville Railroad Company's franchise, or intangible, properties, excluding values which are separately taxed in the State of Kentucky.....	17,345,591.34
Percentage which the mileage operated, owned, leased or controlled in the State of Kentucky bears to the total mileage operated, owned, leased or controlled within and without the State of Kentucky	24.6901%
On basis of which percentage Kentucky's proportion of the value of the Louisville & Nashville Railroad Company's franchise, or intangible property subject to taxation in the State of Kentucky, at 100% valuation is.....	4,282,643.85

The property in Kentucky is generally, habitually, and intentionally, by the assessing authorities of said State, assessed and taxed at less than 60% of its real value, and equalizing said 100% valuation of the franchise of the Louisville & Nashville Railroad Company subject to taxation in
747 Kentucky for 1913, we have as the maximum equalized value of the franchise of the Louisville & Nashville Railroad Company subject to taxation in the State of Kentucky, for the year 1913, 60% of $4,282,643.85, or..... $2,569,586.31

GEO. W. LAMB.

STATE OF KENTUCKY,
County of Jefferson, ss:

Subscribed and sworn to by Geo. W. Lamb before me, a Notary Public in and for the State and County aforesaid, this 28th day of January, 1914.

My commission expires on the 30th day of January, 1916.

Witness my hand and notarial seal this 28th day of January, 1914.

J. F. DAVIS,
Notary Public, Jefferson County, Ky.

748 After the filing of the aforesaid affidavit, the said Geo. W. Lamb was produced by plaintiff for cross examination by defendants on the subjects embraced in said affidavit, but defendants declined to cross-examine him.

Plaintiff also filed and read in evidence as a deposition (under stipulation) a second affidavit of said Geo. W. Lamb referred to as affidavit of Geo. W. Lamb No. 2, the purpose of which was to make certain corrections and explanations as to the income of the Louisville & Nashville Railroad Company for the year ending June 30, 1912, and also four exhibits marked A, B, C, and D, with said affidavit, which affidavit and exhibits are as follows, to-wit:

749 In the District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
versus
H. M. BOSWORTH et al., Defendants.

Affidavit of Geo. W. Lamb, No. 2.

Affiant Geo. W. Lamb states that he is 40 years of age and is a resident of Louisville, Ky., and is Second Assistant Comptroller of the Louisville & Nashville Railroad Company, and that his duties

as such Second Assistant Comptroller are to assist the comptroller of said company in the supervision and direction of all of the accounts, records and statistics of said company; that he has been connected with the Accounting Department of the Louisville & Nashville Railroad Company for about 14 years and is familiar with all the accounts, records, and statistics of said company.

Affiant is the same Geo. W. Lamb who, heretofore, to-wit, on the 28th day of January, 1914, made an affidavit which was used
750 and filed in support of a motion for a temporary injunction in this case, and which has, by stipulation, been received, accepted, and considered as valid evidence upon the final trial of this case.

Affiant has been requested to explain

(1) The amount of total income of the Louisville & Nashville Railroad Company shown in Exhibit G. W. L. No. 2, filed before the Board of Valuation and Assessment, and made a part of the record in this case, which amount is $16,201,150.75, and

(2) The amount of gross corporate income of the Louisville & Nashville Railroad System, as shown by report to the Kentucky Railroad Commission and to the Interstate Commerce Commission, used by the Board of Valuation and Assessment in making its calculation referred to in this case, which amount is $18,052,905.12, and

(3) The amount of gross income, as shown by the annual report of the Louisville & Nashville Railroad Company to its stockholders for the fiscal year ended June 30, 1912, which amount is $17,159,550.82, and

(4) The amount of net income shown in the report of the Louisville & Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30, 1912, which amount is $5,447,558.06.

And affiant says generally that the differences betwen the amounts of income shown on or in said several reports and statements are due to the fact that said several reports and statements call for
751 different statements of fact, or for statements of the same results in different forms and the amounts shown as gross income in the several statements showing such items are not the final results of the statements, but are intermediate results which vary according to the form in which the complete statement is presented; that is to say, the amount of total income shown on Exhibit G. W. L. No. 2 sets forth the amount of total income subject to the control of the stockholders of the Louisville & Nashville Railroad and properly to be considered in determining the franchise value of the Louisville & Nashville Railroad Company in so far as income may be properly used as a basis for determining such values. The gross corporate income of the Louisville & Nashville System, as shown by the report to the Kentucky Railroad Commission and by the report to the Interstate Commerce Commission, is the gross corporate income of all lines operated by the Louisville & Nashville Railroad Company, and includes the income of lines, the results of whose operation do not accrue to the stockholders of the

Louisville & Nashville Railroad Company or to the company itself; that is to say for example, said gross corporate income of the Louisville & Nashville System, as shown by reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission, include results of operation of the South and North Alabama Railroad Company, of the Elkton & Guthrie Railroad, and of the Glasgow Railway, and of the Frankfort and Cincinnati Railway,
752 which were not available for the payment either of interest or dividends of the Louisville & Nashville Railroad Company.

The amount of gross income shown by the report of the Louisville & Nashville Railroad Company to its stockholders also includes results of operation of said roads, the results of operation of which were not available to or subject to the control of the stockholders of the Louisville & Nashville Railroad Company, but the amounts of such operations included in the gross income, shown in the annual report to the stockholders, are different from the amounts of such operations included in the gross corporate incomes in the reports to the Interstate Commerce Commission and to the Kentucky Railroad Commission, because of differences in forms in which are stated the complete income accounts of which the different amounts of gross income stated represent single and intermediate items only; that is to say specifically—the gross corporate income shown in both cases includes the net operating revenues of said roads whose results were not available to the stockholders of the Louisville & Nashville Railroad, but certain credits to income account for these roads from sources other than operation were included in the gross corporate income in the annual reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission, but were not included in the gross income shown by the annual report to the stockholders. In the annual report to the stockholders, these items of income were deducted from corresponding debits to income and the net amount of debit resulting was
753 deducted from the gross income, while in the income account in the reports made to the Kentucky Railroad Commission and to the Interstate Commerce Commission total credits were added and total debits were deducted instead of making a net deduction as was done in the form used in the annual report to the stockholders, and in like manner there are other income accounts such as rent and interest accounts, which are included according to their net balances in the report to the stockholders, but are included according to total debits and credits in the reports to the Commission. The final results indicated by the two income accounts, *i. e.*, the income account in the reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission, on the one hand, and the income account in the report to the stockholders, on the other hand, are identical, but by reason of a difference in the form of statement observed in the two accounts the amounts of gross income which are only intermediate statements in the income account, are different in the two reports. The net results of the two statements of income account, or the amount of net income transferred to the

credit of profit and loss account, is the same in both cases, to-wit, $9,560,771.88. The amount of net income shown in the report of the Louisville & Nashville Railroad Company to the Auditor of Public Accounts of Kentucky as of June 30, 1912, is the result of the form of statement required by the blank report furnished by the Auditor of Public Accounts.

Affiant gives below in detail the items constituting the difference between the several statements of income and shows
754 that the amount of total income stated on Exhibit G. W. L. No. 2, to-wit, $16,201,150.75 is correct.

The gross income as shown by the annual report to the stockholders for the fiscal year ended June 30, 1912, was.....		$17,159,550.82,
to which should be added to determine the total income to be used as a basis of capitalization, the following:		
Deficit from operation of the Frankfort and Cincinnati Railway, for the year ended June 30, 1912, included in the gross income results as shown by the annual report to the stockholders, and thereby reducing the amount of gross income improperly for the purposes of taxation...	$11,926.30.	
Income from operation of the Georgia Railroad Lease for the year ended June 30, 1912, credited
755 direct to profit and loss in the annual report, but representing an income to the stockholders of the Louisville & Nashville Railroad Company, and properly chargeable in a statement of income for the purposes of taxation.....	68,911.08.	
Interest on bonds of the South & North Alabama Railroad, not included in income from investment, but treated as a deduction from interest on bonded debt.....	231,400.00.	
Interest on bonds of the Frankfort & Cincinnati Railway not included in income account.....	6,400.00	318,637.38,
giving a total of.....		17,478,188.20,
from which must be deducted net operating revenues of the Elkton & Guthrie Railroad.....	6,049.84;	
net operating revenues of the Glasgow Railway	31,847.95;	

gross income of the South and North Alabama Railroad included in the amounts of gross income, shown above, which gross income of the South and North Alabama Railroad so included embraces the net operating income of the South and North Alabama Railroad and certain other but not all items of other income of the South and North Alabama Railroad Co.. 1,239,139.66 1,277,037.45;

leaving total amount of income for purposes of taxation, as per Exhibit G. W. L. No. 2..... 16,201,150.75.

The net income shown in the report to the Auditor of Public Accounts was..... 5,447,558.06,

to which are to be added the following items, shown in said report to the Auditor of Public Accounts, under the general classification of "Expenses," which charges are not treated as expenses in Exhibit G. W. L. No. 2, to-wit:

Interest on bonded debt.... 5,964,040.67;

Dividends 4,200,000.00;

Rent paid for leased roads—net.... 60,570.00;

Rents paid for joint tracks, yards and other facilities—net..... 210,020.85.

"Other Expenses," to-wit:

Sinking Fund charges deducted from income account, but not claimed as expenses in Exhibit G. W. L. No. 2, although in affiant's opinion such amounts ought properly to have been claimed and deducted 250,049.33;

Total 16,132,239.67,

to which should be added also the income from operation of the Georgia Railroad Lease which was credited to profit and loss account and not included in the report of income account to the Auditor of Public Accounts..... 68,911.08,

resulting in a total amount of income shown by Exhibit G. W. L. No. 2..... 16,201,150.75.

The amount of gross corporate income shown in the Income Accounts in the reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission....			18,052,905.12
includes the following credits to Income Account for operations of roads whose results were not available to Louisville & Nashville Railroad Company Stockholders, and which were not shown in the gross income in the Income Account in the report to the stockholders and includes also other items not included in the statement of gross income in the report to the stockholders, as follows, to-wit:			
Taxes, South & North Alabama Railroad deducted in report to stockholders, but not in reports to Commissions.....	759	160,074.12.	
Rents received for tracks, yards, and terminals shown as a separate item in the reports to the Commissions, but which should be deducted from the aggregate amount of rents paid for tracks, yards and other facilities, in order to obtain net results of rents paid and received....		324,562.87	
Miscellaneous rents handled in a similar manner.....		28,847.31.	
Nashville and Decatur dividends on stock owned by the Louisville & Nashville Railroad Company, which is merely a book account, no actual payments being received, the Louisville & Nashville Railroad Company owning the stock and paying rent or dividend		148,470.00.	
Interest on South and North Alabama Bonds not included in the Income Account in the report to the stockholders, but included, as shown in above statement, in amount of Exhibit G. W. L. No. 2.....	760	231,400.00	693,354.30.
Deducting which amounts from the gross income or intermediate amounts, shown in the Income Accounts to the Commissions, there remains the amount shown in the report to the stockholders, to-wit...			17,159,550.82.

And affiant has previously explained how this amount shown in Income Account in the report to the stockholders should be corrected in order to afford the correct total income for the purposes of capitalization, as set forth in Exhibit G. W. L. No. 2.

Affiant further says that these discrepancies and the improper use made by the State Board of Valuation and Assessment of
761 intermediate amounts in calculations of income accounts not furnished for the purposes of taxation is but a further illustration of the impropriety of using the reports to the Railroad Commission of Kentucky in an attempt to make an assessment of properties, either intangible or tangible, for the purposes of taxation, to which affiant has previously, in his testimony before the State Board of Valuation and Assessment, drawn attention.

But for the purpose of affording a direct comparison between the amount of gross corporate income, shown in the income accounts in the reports to the Kentucky Railroad Commission and to the Interstate Commerce Commission.. and the amount of income shown on Exhibit G. W. L. No. 2	$18,052,905.12.
	16,201,150.75.
Affiant gives below the differences between these two statements:	
To the gross corporate income, shown in the annual reports to the Commissions, there must be added the following amounts:	18,052,905.12.
Deficits from operations of the Frankfort & Cincinnati Railway for the year	

ended June
762 30, 1912, inclusive as a negative quantity in the items going to make up the gross corporate income, but not properly includable therein for the purposes of assessment for taxation, because the Frankfort & Cincinnati Railway is separately owned, operated and taxed line ..... $11,926.30.

Interest on bonds of the Frankfort and Cincinnati Railway not included in the gross corporate income shown in the reports to the Commission, but properly a part of the income of the Louisville & Nashville System .. 6,400.00.

Louisville & Nashville Railroad Company's proportion of income from operation of the Georgia Railroad Lease for year ended June 30, 1912, not included in the gross corporate income shown in reports to the Commissions but properly to be shown as a part of the income
763 of the Louisville & Nashville Railroad Company in connection with assessments for taxation ..... 68,911.08.

making total addition of ..... $87,237.38.

and increasing the amount of gross corporate income to,.. 18,140,142.50

And from the gross corporate income shown in the reports to the Commissions there must be deducted the following amounts:		
Net operating revenues of the Elkton & Guthrie Railroad and of the Glasgow Railway, included in gross corporate income in reports to the Commissions but not a part of the real income of the Louisville & Nashville Railroad Company:		
E. & G. Railroad		6,049.84
Glasgow Railway		31,847.95.
Operations of South and North Alabama Railroad included in gross corporate income:		
Net operating Revenue	$1,670,013.84	
Rent—Joint Facilities	2,485.21	
Miscellaneous Rents	9,806.46	
Total	$1,682,305.51	
764 S. & N. A.—Debit:		
Hire of Equipment—Balance	280,596.52.	
Net amount included in gross corporate income in L. & N. reports to Commissions		$1,401,708.99.
Rent paid for joint facilities, as shown by income account in reports to Commissions	$537,691.03.	
less amount of South & North rentals paid included therein	6,043.72	
		531,647.31.

Miscellaneaus rents paid by L. & N., as shown by reports of Commissions	$28,847.31,	
less amount of S. & N. A. miscellaneous rents included therein	10.00	
	28,837.31	
Rent paid for Nashville & Decatur Railroad, of which $148,470.00 is included in gross corporate income, shown in reports to Commission as divided declared on stocks owned or controlled, being merely a book entry representing a payment by the Louisville & Nashville Railroad Company to itself not actually made		277,951.84,
making total deductions of		$2,278,043.24
Leaving as gross corporate income to be considered		15,862,099.26
But in arriving at the income shown on Exhibit G. W. L. No. 2, affiant failed to deduct rents paid for tracks, yards and terminals in excess of rents received for tracks, yards and terminals, amounting to	$213,128.16,	
less net balance of South & North Alabama Railroad, included therein ($6,043.72—$2,485.21) or	3,558.51,	$209,569.65.

765

And affiant failed to deduct rental paid other stockholders of the Nashville & Decatur Railroad Company for rent of that line 129,481.84,

so that affiant in Exhibit G. W. L. No. 2, overstated the amount of income by reason of his failure to deduct said rents $339,051.49,

adding to which amount the correct amount of income arrived at above, there results the income shown on Exhibit G. W. L. No. 2 ..... 16,201,150.75.

766

And for further certainty, affiant attaches hereto and makes a part hereof detailed statements of the Income Accounts discussed in this affidavit as follows:

Marked Exhibit A: A statement of the Income Account as reported to the Railroad Commission of Kentucky and to the Interstate Commerce Commission.

Marked Exhibit B: A statement of Income Account as included in the Annual Report of the Railroad Company to its stockholders.

Marked Exhibit C: A copy of the Income Account as set forth in Exhibit G. W. L. No. 2, which is furnished for convenient reference.

Marked Exhibit D: A copy of the Income Account as set forth in the report of the Louisville & Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30, 1912.

In arriving at the total income of $16,201,150.75, shown on Exhibit G. W. L. No. 2, affiant erroneously failed to deduct rents paid by the Louisville & Nashville Railroad Company for the lease of any property from which it received earnings, except to the extent that counter-balancing rents were received by the Company. That rent only was deducted which was paid for property, the earnings of which went to other roads and other rents or rents of joint facilities for which the Louisville & Nashville Railroad Company received earnings were ignored.

767

With respect to such property from which the Louisville & Nashville Railroad Company received earnings, the rent account omitted, represented payments of $531,647.31
and receipts of 322,077.66
leaving a net debit balance of 209,569.65

EXHIBIT "A" WITH LAMB'S AFFIDAVIT.

INCOME ACCOUNT

As Reported in the Annual Report of the Louisville & Nashville Railroad Company to the Railroad Commission of Kentucky and to the Interstate Commerce Commission for the Fiscal Year Ended June 30, 1912.

Operating Income—		
Rail Operations—		
Operating Revenues—page 45	$56,211,788.30	
Operating Expenses—page 65 (or 65A)	39,626,327.44	
Net Operating Revenue		$16,585,460.86

NOTE—Included in the amount of net corporate income, $9,560,771.88, shown on page 41 of this report, should be deducted the amounts shown in detail on memorandum attached to page 38, amounting to $949,100.70, leaving $8,611,671.18. To this amount should be added the deficit arising from operation of the Frankfort & Cincinnati Railway, which line is operated for account of the owners, $11,475.10, making the net corporate income available to the stockholders of the Louisville & Nashville Railroad Company $8,623,146.28.

EXHIBIT "B" WITH LAMB'S AFFIDAVIT.

ANNUAL REPORT TO THE STOCKHOLDERS OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, 1911-12.

Income Account as Reported to the Stockholders of the Louisville & Nashville Railroad Company.

TABLE No. 1.

INCOME ACCOUNT.

Operating Income—		
Rail Operations—		
Operating Revenues—		
Revenue from transportation	$55,780,590.31	
Revenue from operations other than transportation	431,197.99	
Total Operating Revenues		$56,211,788.30
Operating Expenses—		
Maintenance of way and structures	8,828,754.68	
Maintenance of equipment	10,071,303.59	
Traffic expenses	1,178,108.12	
Transportation expenses	18,408,196.99	
General expenses	1,139,964.06	
Total Operating Expenses, 70.49 per cent		39,626,327.44
Net Operating Revenues, 29.51 per cent		16,585,460.86
Outside Operations—		
Revenues	385,737.92	
Expenses	393,916.84	
Deficit		8,178.92
Total Net Revenues		16,577,281.94
Taxes		1,854,684.40
Operating Income		14,722,597.54
Income from Rents—		
Clarksville & Princeton Branch	$ 12,039.70	

and affiant also failed to deduct the rental paid the stockholders of the Nashville & Decatur Railroad Company other than the Louisville & Nashville Railroad Company for the use of the Nashville & Decatur Railroad amounting to..... 129,481.84
that is to say, in his Exhibit G. W. L. No. 2, affiant overstated the income of the Louisville & Nashville Railroad operation by failure to deduct net rents to the extent of 339,051.49
and the amount of income shown by affiant instead of 16,201,150.75
should have been 15,862,099.26

GEO. W. LAMB.

768 STATE OF KENTUCKY,
County of Jefferson, sct.

Subscribed and sworn to by Geo. W. Lamb before me, J. F. Davis, a Notary Public in and for the State and County aforesaid this 14th day of October, 1914.

My commission expires on the 30th day of January, 1916.

Witness my hand and notarial seal this 14th day of October, 1914.

J. F. DAVIS,
Notary Public, Jefferson County, Ky.

(Here follows Exhibit A and B with Lamb's affidavit, marked pages 769 and 770.)

771 EXHIBIT "C" WITH LAMB'S AFFIDAVIT.

Copy of Income Account as Set Forth in Exhibit G. W. L. No. 2.

Louisville & Nashville Railroad Company.

Statement Showing for the Fiscal Year Ended June 30, 1912, the Total Value of All the Property of the Louisville & Nashville Railroad Company, both Tangible and Intangible, Arrived at by Capitalization of Income from all its Lines and Investments before Deducting Charges Against Income, Such Capitalization Being Computed on Basis of Composite Per Cent, Six Per Cent and Eight Per Cent, Respectively.

Operating Revenues		$50,793,419.51
Operating Expenses		35,913,716.67
Net Operating Revenues		$14,879,702.84
Outside Operations (Net) Deficit		6,178.92
Total Net Revenue		$14,871 523.92
Taxes		1,688,756.05
Operating Income		$13,182,767.87
Income from Rents—		
Clarksville & Princeton Branch	$12,039.70	
Paducah & Memphis Division	206,506.20	
Equipment	783,439.03	
Various Sources	53,615.62	
		1,055,600.65
Income from Investments		1,189 [illegible]1.56
Income from Operation of Georgia Railroad Lease		68,911.08
Interest Various Sources		704,869 70
Total Income		$16,201,150.75
Total Capitalization at—		
6.52%		$248,331,556.58
6 %		270,019,179.17
8 %		202,514,384.38

772 EXHIBIT "D" WITH LAMB'S AFFIDAVIT.

Copy of Income Accounts as Shown in Report of the Louisville & Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30, 1912.

Name of Corporation—Louisville & Nashville Railroad Company.

Name of principal place of business of the corporation, company or association you represent—Louisville, Ky.

Give the correct postoffice address of the company—

Give the name and official position of the officer making this report—

Name—Chas. Hayden. Position—Comptroller.

Give name of State under which company is incorporated—Kentucky.

The kind of business in which the said corporation, company or association is engaged—A common carrier engaged in the business of transporting freight, passengers, mail and expresss matter.

The amount of capital stock, preferred and common, of said corporation, company or association, as of June 30, 1912—

Preferred—None. Common—$60,000,000.00.

Number of shares, preferred and common, composing the capital stock of the said corporation, company or association, on June 30, 1912—

Preferred—None. Common—$600,000.

773 Amount of capital stock as above, paid-up—$60,000,000.00 "A."

Par value of the preferred stock, as above—None.

Par value of the common stock, as above—$60,000,000.00.

Real value of the stock, as above, preferred—None; common—Unable to state.

Highest price at which the stock above mentioned was sold at a bona fide sale within twelve months next before June 30, 1912—$— per share.

Amount of surplus fund and undivided profits, and the value of all other assets of the said corporation, company or association on June 30, 1912—

Surplus fund —. Undivided profits $—; value of all other assets, $29,748,543.63, which includes surplus fund and undivided profits.

State the total amount of indebtedness, as principal, of the said corporation, company or association, on June 30, 1912—

Bonded indebtedness, $136,078,500.00; rate of interest paid, 3-4-4-½, 5 and 6 per cent.

Other indebtedness, $11,374,348.83; amount of interest paid $—.

Total indebtedness, $147,452,848.83.

State separately the total amount of gross and net earnings, or income of the said corporation, company or association, including interest on investments, and income from all other sources for twelve months next before June 30, 1912—

774 Operating revenues	$50,793,419.51	
Miscellaneous income	1,760,470.25	
Investments	1,189,001.55	
Gross earnings or income		$53,742,891.31
Operating expenses	$35,913,716.67	
Taxes	1,688,756.05	
Interest on bonded debt	5,964,040.67	
Dividends	4,200,000.00	
Rents paid for lease of road (net)	60,570.76	
Rents paid for joint tracks, etc. (net)	210,020.85	
Outside operations, Bal. Dr.	8,178.92	
Other expenses	250,049.33	
Total		$48,295,333.25
Net income		$5,447,558.06

775 The said Geo. W. Lamb also testified orally before the Court as follows, to-wit:

Oral Examination of Geo. W. Lamb Before the Court.

I am the same Mr. Lamb who testified before the Board of Valuation and Assessment with respect to the assessment of the franchise of the Louisville & Nashville Railroad Company in Kentucky for the year 1913. I am the Second Assistant Comptroller of the Louisville & Nashville Railroad Company.

When testifying before the Board, I presented certain comparisons of assessments of the franchises of certain corporations made by the said Board of Valuation and Assessment with real value of such franchises, as shown by information on the slips and jackets in the office of the Board, with respect to those companies; the general result of such comparisons being shown by me on Exhibit Geo. W. Lamb No. 30. I have since made additional similar comparisons showing the results as to other corporations, all relating to the same year. These comparisons also being made on the basis of figures shown by the records in the office of the Auditor of Public Accounts of the State. The corporations whose assessments are shown on this additional statement which I have prepared are The Louisville Home Telephone Company, The Paducah Traction Company, the Paducah Light & Power Company, the Flemingsburg Telephone Company, the Versailles Electric Light Company, the Greenville Light & Water Company, the Rock House Telephone Company, and Shelby County Telephone Company.

The results of the comparisons referred to as to these companies are shown on a statement which I file herewith marked "Exhibit G. W. L. Court—No. 1.", and is as follows:

COURT EXHIBIT G. W. L. No. 1.

Louisville and Nashville Railroad Company.

Statement Showing Total Valuation in the State of Kentucky of Various Corporations Arrived at by Capitalizing Net Income, or as Represented by Par Value of Stock and Bonds as of June 30, 1912, the Total Values as Assessed by the Board of Valuation and Assessment for 1913, and the Ratios of the Assessed Values to the Real Values.

		Valuation based upon capitalization of income.	Valuation based upon stock and bond values.	Assessments.	Ratio of assessment of total valuation based upon capitalization of income.	Ratio of assessment to total valuation based upon stock and bond values.
Louisville Home Telephone Co.:						
Interest	$86,487.50					
Dividends	78,600.00					
Enlargement of Plant	148,723.07					
	$313,810.57					
Less Net Deficit	78,477.15					
Total Income	$235,333.42					
Total Net Income capitalized at 6% would equal.	$3,922,223.67					
Assigned to the State of Kentucky on the basis of mileage operated, owned, leased or controlled, as shown below		$2,934,804.00	.....	$875,000.00	29.81%	
Mileage in Kentucky	214					
" outside of Ky	72					
	286					
Percentage of Mileage in Kentucky to total Mileage	74.825%					
Value of Stock and Bonds—Par Value	$3,337,800.00					
Assigned to the State of Kentucky on the basis of mileage operated, owned, leased or controlled, as shown above, 74.825%		.....	$2,497,509.00	875,000.00	.....	35.03%

Paducah Traction Company:						
Interest	$52,598.09					
Enlargement of Plant	33,835.78					
	$86,433.87					
Less Net Deficit	57,342.47					
Net Income	$29,091.40					
Total Net Income Capitalized at 6% would equal		$484,857.00	.....	260,000.00	53.62%	
Value of Stock and Bonds—Par Value		.....	1,007,000.00	260,000.00	.....	25.82%
Paducah Light and Power Company, Inc.:						
Interest	$49,383.92					
Enlargement of Plant	66,475.06					
	$115,858.98					
Less Net Deficit	69,353.97					
Net Income	$46,505.91					
Total Net Income Capitalized at 6% would equal		$775,098.00	.....	275,000.00	35.48%	
Value of Stock and Bonds—Par Value		.....	1,285,000.00	275,000.00	.....	21.40%
Flemingsburg Telephone Company:						
Interest	$4.13					
Dividends	1,000.00					
Enlargement of Plant	225.09					
Net Income	315.54					
Net Income	$1,544.76					
Total Net Income Capitalized at 6% would equal		$25,746.00	.....	7,500.00	29.13%	
Value of Stock (no bonds) Par Value		.....	20,000.00	7,500.00	.....	37.50%
Versailles Electric Light Company:						
Interest	$1,258.91					
Enlargement of Plant	762.15					
	$2,021.06					

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Less Net Deficit	324.24				
Net Income	$1,696.82				
Total Net Income Capitalized at 6% would equal		$28,280.00		15,000.00	53.04%
Value of Stock and Bonds—Par Value			40,000.00	15,000.00	37.50%
Greenville Light and Water Company:					
Interest	$739.00				
Enlargement of Plant	3,254.62				
Net Income	359.35				
Net Income	$4,352.97				
Total Net Income Capitalized at 6% would equal		$72,549.00		26,700.00	36.80%
Value of Stock and Bonds—Par Value			47,900.00	26,700.00	55.74%
Rock House Telephone Company:					
Dividends	$1,377.50				
Net Income	31.47				
Net Income	$1,408.97				
Total Net Income Capitalized at 6% would equal		$23,483.00		7,500.00	31.94%
Value of Stock (No Bonds)—Par Value			13,190.00	7,500.00	56.86%
Shelby County Telephone Company:					
Interest	$1,800.00				
Less Net Deficit	100.00				
Net Income	$1,700.00				
Total Net Income Capitalized at 6% would equal		$28,333.00		16,000.00	56.47%
Value of Stock and Bonds—Par Value			90,000.00	16,000.00	17.78%

B.

777 Cross-examination of Mr. Lamb:

I do not know the total number of corporations assessed by the Board of Valuation and Assessment. I am informed there are three or four hundred. I did not investigate all of these, did not attempt to do so. I did not have time to go over all of them. I took these out just as they came for a given period.

Referring to the Louisville Home Telephone Company, they show a deficit, according to their report, of $78,477.15. But included in that is interest at $86,487.50, and dividends of $78,600., and they also report enlargement of plant $148,723.07. That makes a total of $313,810.57. I have deducted from that the deficit of $78,477.15, leaving income of $235,333.42. I have treated the $148,723.07, expended in enlargement of plant as a part of the net income. It is not a pr-per charge against income.

I did not hear the proof of the Louisville Home Telephone Company introduced before the Board at the time the valuation was fixed. I took my information from their report to the Auditor's office. If the item of $148,723.07 was shown to be an error, and if it were shown that this was expense of operation, then, of course, it should be deducted in arriving at net income.

As to the Paducah Traction Company, it would not have any franchise value based on capitalization of income, if in fact it had a deficit, but the apparent deficit of $57,342.47 was obtained by including $52,598.09 of interest and a charge to enlargement of plan of $33,835.78. In preparing my statement I did not know that officers of the corporations testified before the Board of Valuation and Assessment that they had borrowed the larger part of the money with which to pay interest items; nor did I know that they testified before the Board that an increase of their franchise would put them into bankruptcy.

At this point Counsel for the Louisville & Nashville Railroad Company objected to the assumption of the facts just mentioned as to the alleged testimony of the officers of the Paducah Traction Company unless counsel for defendant expected to prove them; to which the Attorney General responded that he expected to

778 prove them. As to the Paducah Light & Power Company, I do not know whether or not it is owned by the same holding company that owns the Paducah Traction Company. I did not inquire of the Board or of any one as to what, if any evidence was given at the hearing, explaining the assessment they made against the franchise of those corporations. I know that I had the sworn statements of the various officers as reported to the Auditor of Public Accounts for Kentucky, in their reports for the year ending June 30, 1912. In each instance, where the figures showed amounts expended for enlargement of plant, and that these amounts had been deducted from gross income, I deducted such charges. Charges of this kind did appear in all except two cases.

None of the companies referred to in the statement which I have just filed, marked Exhibit G. W. L.—Court—No. 1, are engaged

in interstate commerce, except the Louisville Home Telephone Company.

Redirect examination of Mr. Lamb:

In none of the statements of net income of the Louisville & Nashville Railroad Company used before the Board of Valuation and Assessment were expenditures for enlargement of plant and betterments deducted from the gross income in arriving at the net income. If such deductions had been made, then most of the net income shown in those statements would have been greatly less than they are, for the Louisville & Nashville Railroad Company, has enlarged its plant, but has never charged expenditures of that kind to income.

Recross-examination of Mr. Lamb by the Attorney General:

I do not know whether the Paducah Traction Company or the Paducah Light & Power Company have ever paid a dividend.

The statement which I have filed does not show the tentative assessments of the different corporations there referred to, but only final assessments, as they appear on the jackets. I do not
779 know anything about the evidence introduced before the Board by those companies.

Testimony of John E. Garner.

JOHN E. GARNER was introduced as a witness for plaintiff, and testified orally before the Court as follows:

My home is in Winchester, Kentucky. I was at one time Chairman of the State Board of Equalization. My period of service covering the four years of Governor Willson's administration; that is from 1908 to 1911, both inclusive.

During the course of my service on the Board, I formed an opinion as to the values of properties in Kentucky, and also concerning the matter of the relative proportion of actual values to assessed values and in my judgment—it is merely my opinion—as a result of experience and observation while on that Board, that it was the practice of assessors in assessing lands to assess them at from 40 to 50 per cent of their real value. I speak with reference to all classes of real estate, whether town lots or lands.

As to the assessment of tangible personal property, it would be very difficult to arrive at a percentage of them. The trouble there was more a matter of escaping taxation than paying taxes. In the matter of thoroughbred stock, however, I might state a particular instance. In Fayette County where the entire lot of thoroughbred animals was assessed at $57,000., it is my recollection that it was shown by witnesses that four such animals in that county had been bought within that year of assessment for more than twice that amount.

In performing our duties as an equalizing board, when these assessments came in from the different counties, we would take the

one that in our judgment was the least badly assessed—none were correctly assessed in our judgment—and then make the best figure we could by bringing others up to that.

The estimate which I have given to the effect that the proportion of assessed to actual value was from 40 to 50 per cent is the result of four years' experience and observation on the Board of
780 Equalization, but you must understand that the Board endeavored to raise that assessment to, I should say, approximately 60 per cent of its value.

In the four years during which I was a member of the Board of Equalization, it annually made reports to the Governor, signed by the members of the Board. I wrote all those reports and endeavored to state the facts—state the case as it was——.

Cross-examination of Mr. Garner by Attorney General Garnett:

What I have testified to refers to the four years when I was a member of the Board. I know nothing since then.

I have stated that it was the purpose of the Board of Equalization to equalize the value of farm lands and town lots at 60 per cent of their true value, and that is what we endeavored to do.

Before I entered upon the discharge of my duties, I took the constitutional oath as a member of the Board of Equalization; but that oath did not require me to see that property was equalized and assessed at its fair cash value. I conceived my duty to be to equalize the taxation between counties. We could only take the assessments as returned to us by the assessors and equalize them—not re-assess them. I did not conceive it to be within the power of the Board to equalize the counties by raising them to the fair cash value; and we did not attempt to do so.

I think it is the custom throughout Kentucky for assessors to accept the values given by the individual tax-payers.

My opinion in changing values and raising them was based upon the testimony of witnesses who were brought before the Board, and from an examination of the transfer sheets that were sent there, and from the members of the Board who were acquainted with different parts of the State.

I owned real estate during the four years I was a member of the Board; and I did not assess it at its true value. The people of my own county (Clark) did not assess their real estate at its true value.

Clark County was not raised, and I was Chairman of the
781 Board, and I knew that Clark County was not assessed as it should have been. The records will show, however, that I made a motion each year that Clark County should be raised; but we had a most plausible county judge that came before the Board and made the statement that I was over-anxious, for fear that I should be criticized.

I do not remember the percentage of assessed value to true value in Fayette County during the four years I was on the Board. I remember there was a division of the Board on Fayette in more

than one instance. I cannot recall whether Fayette was raised during those years or not.

I think Madison County was raised, but I cannot recall how much. It was not assessed at its true value.

Jessamine County was not properly assessed, but I cannot undertake to remember just what counties were raised.

These counties were not raised to their true value, because if we had raised them to their true value, they would have been raised in excess of every other county in the State. None of them were assessed their true value.

If we had raised all of the counties to their true value then they would have been equalized, but I do not know that we had the authority to do that. I am satisfied that I would not have been here testifying if we had. Franklin County being the nearest, would have gotten me first, and the other counties in the order in which I went through them.

As to my reasons why the assessors did not assess at fair cash value, I think many of the assessors were incompetent. Many of them were elected for wrong reasons—because they could not support themselves in any other way. In many instances the assessors were candidates for sheriff, and they made friends during the assessment period—nearly all of them. Then another reason was that they did not want their counties to pay an undue proportion of the taxes, and they undertook to protect them. Many of them testified that they did not want to assess their counties higher than other people were assessed.

I do not think any assessor confessed to any agreement between the assessors throughout the state to assess property at less
782 than its fair cash value, but from an examination of witnesses and matters of transfer, we would have cases where all of the transferred property was shown to be assessed at 80%, and if we were to ask the assessor if he had assessed the rest of the property at that rate he would admit that he had not; that he had probably attempted to put it at 45% of its real value—that that was what he had understood was done in neighboring counties. Many of them admitted that they did not attempt to assess at more than 40% or 50% of the value of the property and the Board of Supervisors did the same thing, many of them. There was something to prevent us from raising all of the counties to 100%. I do not think we had the authority under the law to do so. As I understood, the Board of Equalization was to take the returns made by the Assessors and, as far as they could, equalize that property by lowering that which was too high or increase that which was too low. As none of them were too high, we looked over all of them, and selected the one that we thought came nearest being correctly assessed, and then we endeavored to bring the other counties up to that. That was the construction the members of the Board put on the law.

I do not understand that it was our duty to equalize up to 100%, and if I had understood that to be the law, I do not know that I would have attempted to equalize at 100%. I probably would not

have done so. The State assumes that property will produce about so much money on a given assessment, that it will run somewhere near the same; and that that is sufficient, or ought to be sufficient, for paying the State's expenses. To have raised the assessments to 100% would have doubled the revenue of the State practically. I do not think I would have done that, even if I had thought that was the law. But I did not believe that it was the law. But if I had known that it was the law, I would not have known how to get at actual values. If I had known the actual values in one county or certain counties, I would not have known how to compare them with counties with which I was not familiar.

783 Redirect examination by counsel for Plaintiff:

At the time the State Board of Equalization was engaged upon this work, the State rate of taxation was fixed, and most of the counties had fixed their rates, based upon the idea that these rates would give them the revenue they were in the habit of getting on the basis of the ordinary assessment; and to have increased the assessments to the fair cash value of the properties would have resulted in a vast increase of revenue more than sufficient—more than was contemplated—both for the counties and the State.

Recross examination by Attorney General Garnett:

I doubt very much if the money thus raised would have kept over until the next year.

Proceedings of the Louisville Board of Equalization.

Plaintiff read in evidence the following certified copy of the proceedings of the Board of Equalization of the City of Louisville, to-wit:

"LOUISVILLE, KY., December 12, 1913.

The Board met with all members present.
The minutes of the last meeting were approved.
The following appeals were acted upon by the Board:

			Assessment.	Sustained.
1	370	Wagner, Jennie, 101 Pennsylvania Ave..	do.	do.
1	375	Bottorf, Izra C., 2920 Franfort.....	do.	do.
1	269	Viser, Martha A., 114 Bayley (n).....	do.	do.
1	290	Smith, Kate, 165 N. Keats.....	do.	do.
1	373	Buckalew, Minnie E., 159 N. Keats.....	do.	do.
1	34	Heffner, Geo. C., E. Bellaire.....	do.	do.
1	372	Thomas, Edmond P., 1912-18 Frankfort..	do.	do.
1	371	Letterle, Jennie L., 1503 Quincy.....	do.	do.
1	6	James, Landers, 1055 E. Main.....	do.	do.
1	202	Nadal, Emma & Laura, 827 Franklin...	do.	do.
1	51	Steinle, Wm. A., 927 E. Jeff.....	do.	do.
1	151	Worhle, Minnie, 412 S. Campb.....	do.	do.
1	374	Miller, Aug. & Wm., F'k't and Hite.....	do.	do.
1	427	White, Alice H., Field, E. of Crescent....	do.	do.
1	241	Widman, Marg't, 2317 F'k't.....	do.	do.
1	239	Smith, A. B., Prospect and Haldeman....	do.	do.
1	292	Specht, William L. Sr., 2420 Frankfort..	do.	do.
1	240	American Naval Stores Co., S. Main.....	do.	do.
1	289	Milliken, Allen E., 166 N. Peterson.....	do.	do.
1	127	Ky. Dist. & W. H. Co., N. Payne, Pine & Hamilton	do.	do.

The matter of Franchise assessments of all Louisville Banks
784 and Trust Cos. coming up for final action, the Board fixed the assessment at a valuation of 60%.

There appearing no further business the Board adjourned to meet December 13th, 1913, at 9 A. M.

W. S. MILLER, *President.*
R. J. McBRYDE, *Member.*
H. V. COHN, *Sec't'y.*

H. C. ROBERTS, *Clerk.*

I, John Buechel, City Assessor for the City of Louisville, do certify that the above and foregoing is a true and correct copy of the minutes of the Board of Equalization of the City of Louisville, held at its office in the City Hall, in Louisville, Kentucky on the 12th day of December, 1913.

(Signed) JOHN BUECHEL,
City Assessor for the City of Louisville.

April 15, 1914."

785 *Report of Tax Commission of* 1912.

Plaintiffs read in evidence the following extracts from the report of December 1913 to the General Assembly of the Commonwealth of Kentucky by the State Tax Commission appointed in March 1912, Page 36 thereof, towit:

Farm lands assessed at fifty-two per cent. of true value.

Thus our tables show that the average ratio of assessed value to true value of farm lands throughout the State is about fifty-two per cent. This establishes the fact of universal undervaluation, although the law calls for full value, and even if, let us suppose, 40 or 60% instead of 52% were the correct figures, that conclusion would be just the same. Again our tables show that the range is from 30% in Taylor county to 80.6% in Jackson. This proves grave inequality between counties, and even if Taylor should eventually prove to be assessed at 40% and Jackson at 70%, inequality exists just the same. For another purpose the accuracy of the general State average is important, and on that account no pains have been spared to ascertain the correct figure, which we place at 52%.

And also the following table from said report:

State at Large.

Total Assessment Roll, 1912		$840,479,194
Estimated Average State and County Tax Rate		$1.20 per $100
Approximate land area		25,715,840 acres
Land assessed in tracts		23,891,526 acres
Other lands		1,924,314 acres
Percentage of land area in farms		80%
23,791,526 acres in tracts with improvements assessed at		$341,895,089 or $14.37 per acre
22,189,127 acres in farms with improvements, census value		635,459,372 or 28.64 per acre
Probable ratio of assessed to true value		52%
Approximate ratio taxes to true value		62 of 1%

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Adair County, Lands and improvements assessed at		$1,572,914
United States Census value		3,271,214
Probable ratio of assessed to true value	46%	
Anderson County, Lands and improvements assessed at		1,882,750
United States Census value		3,751,635
Probable ratio of assessed to true value	51%	
Allen County, Assessed value		$1,576,961
Census value		3,421,135
Ratio	47%	
Ballard County, Assessed value		$2,115,743
Census value		5,751,733
Ratio	36%	

Barren County, Assessed value		$3,095,411
Census value		9,012,307
Ratio	35%	
Bath County, Assessed value		3,502,234
Census value		7,064,622
Ratio	42%	
Bell County, Assessed value		$2,327,797
Census value		1,760,397
Ratio	58%	
Boone County, Assessed value		$4,819,497
Census value		7,420,427
Ratio	62%	
Bourbon County, Assessed value		$10,824,077
Census value		19,812,187
Ratio	56%	
Boyd County, assessed value		$1,313,305
Census value		1,819,746
Ratio	58.5%	
Boyle County, Assessed value		$3,869,610
Census value		7,787,851
Ratio	49%	
Bracken County, Assessed value		$2,346,642
Censlus value		5,492,605
Ratio	42%	
Breathitt County, Assessed value		$1,573,306
Census value		2,457,403
Ratio	61%	
Breckenridge County, Assessed value		$2,409,984
Census value		4,174,672
Ratio	60%	
Bullitt County, Assessed value		$1,810,948
Census value		3,067,745
Ratio	52%	
Butler County, Assessed value		$1,733,344
Census value		2,385,305
Ratio	72%	
Caldwell County, Assessed value		$2,023,747
Census value		3,037,150
Ratio	64%	
Calloway County, Assessed value		$2,871,976
Census value		4,938,940
Ratio	57%	
Campbell County, Assessed value		$4,139,086
Census value		5,405,172
Ratio	74%	
Carlisle County, Assessed value		1,823,793
Census value		3,936,746
Ratio	45%	

Carroll County, Assessed value		1,717,266
Census value		3,447,196
Ratio	50%	
Carter County, Assessed value		1,325,165
Census value		2,818,860
Ratio	42%	
Casey County, Assessed value		1,567,970
Census value		2,764,330
Ratio	55%	
Christian County, Assessed value		5,933,750
Census value		11,203,650
Ratio	53%	
Clark County, Assessed value		5,878,700
Census value		12,530,590
Ratio	45%	
Clay County, Assessed value		1,532,110
Census value		2,322,346
Ratio	56%	
Clinton County, Assessed value		862,394
Census value		1,479,081
Ratio	58%	
Crittenden County, Assessed value		1,755,816
Census value		2,952,821
Ratio	58%	
Cumberland County, Assessed value		1,269,018
Census value		2,131,169
Ratio	61%	
Daviess County, Assessed value		6,755,412
Census value		14,175,347
Ratio	46.6%	
Edmonson County, Assessed value		1,267,098
Census value		1,798,135
Ratio	71.8%	
Elliott County, Assessed value		684,240
Census value		1,181,070
Ratio	63%	
Estill County, Assessed value		$980,560
Census value		1,984,767
Ratio	54.4%	
Fayette Co., Assessed value		13,378,361
Census value		22,744,934
Ratio	54%	
Fleming County, Assessed value		3,920,289
Census value		9,059,308
Ratio	43%	
Floyd County, Assessed value		2,032,933
Census value		3,118,948
Ratio	46%	

Franklin County, Assessed value		3,094,322
Census value		5,738,587
Ratio	55%	
Fulton County, Assessed value		2,188,316
Census value		4,804,134
Ratio	36%	
Gallatin County, Assessed value		996,205
Census value		2,147,280
Ratio	46%	
Garrard County, Assessed value		4,325,120
Census value		8,018,299
Ratio	51.5%	

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Grant County, Assessed value		2,699,176
Census value		5,634,765
Ratio	47%	
Graves County, Assessed value		5,451,734
Census value		9,375,403
Ratio	58.5%	
Grayson County, Assessed value		1,534,467
Census value		3,573,784
Ratio	44%	
Green County, Assessed value		979,081
Census value		3,153,496
Ratio	33.6%	
Greenup County, Assessed value		1,341,900
Census value		2,850,590
Ratio	48%	
Hancock County, Assessed value		1,404,611
Census value		2,152,052
Ratio	59%	
Hardin County, Assessed value		3,493,844
Census value		7,475,233
Ratio	47%	
Harlan County, Assessed value		$2,585,580
Census value		3,272,411
Ratio	47.4%	
Harrison County, Assessed value		5,529,770
Census value		11,058,070
Ratio	50%	
Hart County, Assessed value		2,093,308
Census value		5,239,836
Ratio	34.4%	
Henderson County, Assessed value		6,333,821
Census value		10,389,434
Ratio	51.5%	
Henry County, Assessed value		4,031,438
Census value		8,898,332
Ratio	45.6%	

Hickman County, Assessed value		2,829,462
Census value		5,309,019
Ratio	48%	
Hopkins County, Assessed value		3,178,823
Census value		7,742,602
Ratio	36%	
Jackson County, Assessed value		1,153,593
Census value		1,109,253
Ratio	80.6%	
Jefferson County, Assessed value		15,505,750
Census value		23,715,574
Ratio	60.5%	
Jessamine County, Assessed value		4,815,951
Census value		8,529,690
Ratio	52.7%	
Johnson County, Assessed value		1,605,499
Census value		2,474,899
Ratio	59%	
Kenton County, Assessed value		4,410,363
Census value		4,964,563
Ratio	78.5%	
Knott County, Assessed value		1,056,032
Census value		1,686,023
Ratio	65%	
Knox County, Assessed value		2,028,548
Census value		2,478,581
Ratio	75.4%	

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Larue County, Assessed value		2,129,638
Census value		3,959,859
Ratio	53%	
Laurel County, Assessed value		1,484,286
Census value		2,433,489
Ratio	48%	
Lawrence County, Assessed value		1,540,085
Census value		2,833,114
Ratio	54.7%	
Lee County, Assessed value		$573,652
Census value		783,938
Ratio	49.5%	
Leslie County, Assessment value		1,352,001
Census value		1,358,035
Ratio	62%	
Letcher County, Assessed value		1,623,547
Census value		1,287,628
Ratio	76%	
Lewis County, Assessed value		1,836,734
Census value		3,472,900
Ratio	45%	

Lincoln County, Assessed value		4,216,343
Census value		7,875,335
Ratio	51%	
Livingston County, Assessed value		1,790,292
Census value		2,843,625
Ratio	61%	
Logan County, Assessed value		3,553,961
Census value		8,766,539
Ratio	41%	
Lyon County, Assessed value		1,008,396
Census value		1,628,421
Ratio	47.7%	
Madison County, Assessed value		7,635,970
Census value		13,390,318
Ratio	57.6%	
Magoffin County, Assessed value		1,075,880
Census value		1,963,557
Ratio	56%	
Marion County, Assessed value		2,560,691
Census value		6,095,006
Ratio	42%	
Marshall County, Assessed value		2,074,520
Census value		4,183,373
Ratio	48%	
Martin County, Assessed value		881,803
Census value		805,756
Ratio	51%	
Mason County, Assessed value		6,233,675
Census value		12,032,184
Ratio	52%	
McCracken County, Assessed value		2,939,356
Census value		5,243,944
Ratio	49%	
McLean County, Assessed value		1,820,832
Census value		4,213,041
Ratio	43%	
Meade County, Assessed value		$1,802,432
Census value		2,915,292
Ratio	58%	
Menifee ounty, Assessed value		491,185
Census value		764,066
Ratio	51%	

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Mercer County, Assessed value		4,666,780
Census value		8,508,332
Ratio	53.5%	
Metcalfe County, Assessed value		1,170,701
Census value		2,758,860
Ratio	41%	

Monroe County, Assessed value		1,419,795
Census value		2,330,624
Ratio	63%	
Montgomery County, Assessed value		3,692,525
Census value		8,223,165
Ratio	44%	
Morgan County, Assessed value		1,890,529
Census value		2,392,045
Ratio	76.7%	
Muhlenburg County, Assessed value		2,237,750
Census value		4,035,443
Ratio	43%	
Nelson County, Assessed value		4,025,440
Census value		6,688,789
Ratio	56%	
Nicholas County, Assessed value		3,207,166
Census value		7,293,727
Ratio	40.6%	
Ohio County, Assessed value		3,064,006
Census value		4,907,504
Ratio	59%	
Oldham County, Assessed value		2,541,534
Census value		4,455,865
Ratio	52%	
Owen County, Assessed value		2,660,748
Census value		6,678,405
Ratio	40%	
Owsley County, Assessed value		671,865
Census value		986,426
Ratio	67%	
Pendleton County, Assessed value		2,733,144
Census value		5,028,921
Ratio	55%	
Perry County, Assessed value		1,287,982
Census value		1,538,118
Ratio	58%	
Pike County, Assessed value		3,450,612
Census value		5,280,458
Ratio	66.5%	
Powell County, Assessed value		$590,310
Census value		2,062,961
Ratio	40%	
Pulaski County, Assessed value		3,131,790
Census value		4,154,659
Ratio	69.4%	
Robertson County, Assessed value		839,227
Census value		2,509,929
Ratio	32%	
Rockcastle County, Assessed value		966,441
Census value		1,796,867
Ratio	**52%**	

Rowan County, Assessed value		673,396
Census value		825,089
Ratio	45.5%	
Russell County, Assessed value		1,111,108
Census value		1,801,855
Ratio	62.5%	
Scott County, Assessed value		6,291,067
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Census value		12,790,888
Ratio	51.6%	
Shelby County, Assessed value		8,459,512
Census value		15,960,694
Ratio	53%	
Simpson County, Assessed value		1,854,864
Census value		5,330,386
Ratio	35.4%	
Spencer County, Assessed value		1,884,970
Census value		4,581,366
Ratio	41%	
Taylor County, Assessed value		985,357
Census value		3,116,967
Ratio	30%	
Todd County, Assessed value		2,521,638
Census value		5,593,257
Ratio	45%	
Trigg County, Assessed value		2,110,351
Census value		2,974,735
Ratio	72%	
Trimble County, Assessed value		1,379,550
Census value		2,571,262
Ratio	56.5%	
Union County, Assessed value		5,351,997
Census value		10,777,322
Ratio	48%	
Warren County, Assessed value		6,065,047
Census value		10,915,125
Ratio	55%	
Washington County, Assessed value		2,795,185
Census value		7,706,972
Ratio	38%	
Wayne County, Assessed value		$2,230,718
Census value		3,563,277
Ratio	59%	
Webster County, Assessed value		2,121,388
Census value		6,334,062
Ratio	34%	
Whitley County, Assessed value		2,803,794
Census value		2,863,107
Ratio	71.5%	

Wolfe County, Assessed value		945,202
Census value		1,460,716
Ratio	62%	
Woodford County, Assessed value		6,347,387
Census value		11,543,015
Ratio	56%	

792 Affidavits as to Amount of Assessed Value to Actual Value.

Plaintiff read in evidence as depositions (under stipulation) the affidavits of 189 witnesses to the effect that in their respective communities property was intentionally, habitually, uniformly, and systematically assessed at less than its fair cash value, to-wit, at not exceeding a certain percentage, (given in each case by the witnesses) of its fair cash value. In some cases the witnesses stated that in their communities property which had been sold and conveyed was assessed the first year after the transfer at 80 per cent of the consideration expressed in the deed, but that subsequent to the first year succeeding the transfer the assessment of the property would again revert to the lower percentage, which the witnesses stated prevailed as to property generally. The following is a statement giving as to each witness (1) the county of his residence, (2) the name of the witness, (3) occupation of the witness, and (4) the percentage of assessed value to actual value which the witness stated prevailed in his community.

EPITOME OF PLAINTIFF'S AFFIDAVITS.

COUNTY.	NAME OF AFFIANT.	OCCUPATION.	PERCENTAGE OF ASSESSMENT.
Ballard	D. C. Tackett	Postmaster	50%
Ballard	B. F. Billington	Merchant and Farmer	50%
Bell	H. C. Rice	Dep. Cir. Clerk and Real Estate	60% to 65%
Bell	Ben R. Smith	Planing Mill Business	60% to 75%
Bell	H. B. Jones	Attorney and R. E. A	50% to 60%
Bell	C. N. Miller	Property Owner	40% to 50%
Bell	Chas. N. Herd	Attorney and Editor of Pinnacle News	50%
Bell	H. C. Chappell	Real Estate Agent	50%
Bell	H. H. Steele	Connected with Land Dept. of Middlesboro Town and Land Co. and has served on Board of Supervisors	40%
Bell	J. W. Campbell	City Assessor; City Clerk	40% to 50%
Bell	A. C. Snyder	City Assessor to Jan. 1, 1912	65%
Bell	Dr. L. L. Robertson	Physician and V. P. Nat'l Bank of Middlesboro	60%
Bell	J. H. Purnell	Property Owner	30%
Boyle	R. D. Bruce	Deputy Sheriff and Ex-Assessor	60%
Breathitt	Daniel Turner	Does not state	60%
Breathitt	C. J. Sewell	Does not state	60%
Breathitt	T. H. Hudson	Sheriff	60%
Caldwell	J. D. Leech	Banker and Farmer	50% to 60%
Caldwell	W. D. Dawson	Circuit Clerk	50% to 60%
Caldwell	Henry Towery	Sheriff	50% to 60%
Caldwell	M. P. Smith	Judge (County)	50% to 60%
Caldwell	R. L. Gresham	County Clerk	50% to 60%
Carlisle	John E. Kane	Farmer and Lawyer	60%
Carlisle	J. O. Glenn	Cashier, Deposit Bank	60%
Carlisle	Jas. R. Burnby	Sheriff	60%
Carroll	Jas. L. Boswell	Sheriff and Ex-Assessor	50% to 60%
Carroll	G. P. Harris	Farming and Dairying	40% to 60%
Christian	J. F. Ellis	Dealer in Real Estate	60%
Christian	W. P. Winfree	Lawyer and R. E. Agent	50% to 60%
Christian	Thos. S. Knight	Dealer in Real Estate	60%
Christian	E. C. Rdadford	Dealer in Real Estate	50%
Christian	G. L. Campbell	Farmer	50%
Christian	T. J. McReynolds	Dealer in Real Estate	50%
Christian	W. T. Tandy	Banking	50% to 60%
Christian	W. A. Radford	Circuit Clerk	60%
Clark	J. A. Boone	County Court Clerk	80% first, 60% after first
Clark	J. T. Stockely	Master Commissioner and Ex-Assessor	80% first, 60% after first
Clark	J. W. Wheeler	Member County Board of Supervisors	80% first, 60% after first
Clark	H. T. Strother	Real Estate Business	60%
Daviess	T. A. Pedley (I.C.Case)	Exprt. Accountant	40% to 60%
Daviess	D. O. C. Dougherty	Newspaper Reporter	60%
Estill	Jno. D. Winn	Farmer and Trader	60%
Estill	R. M. Garrett	Farmer	55%

COUNTY.	NAME OF AFFIANT.	OCCUPATION.	PERCENTAGE OF ASSESSMENT.
Estill	Jesse Lunsford	Farming and Timber	60%
Fleming	Charles M. Lee	Clerk, County Court	60%
Fleming	S. J. Collins	Farmer and Tobacco Dealer	60%
Franklin	L. F. Johnson	Real Estate Owner	60%
Fulton	H. F. Taylor	Police Judge, Fulton, Ky	50% to 60%
Fulton	R. M. Chowning	Pres., 1st Nat'l Bank	25% to 45%
Harrison	E. F. Mason	Farmer	60%
Grant	G. S. Webb	Farmer and Trader	35% to 60%
Grant	Robert Childers	Salesman	50% to 55%
Grant	James S. Guage	Farmer	50% to 55%
Grant	C. H. Beasley	Lawyer	50% to 55%
Grant	J. T. Beagle	Circuit Clerk	50%
Grant	James P. Webb	Farming	51% to 55%
Green	W. E. Clark	Liveryman	50%
Green	Pilson Smith	Farmer	50%
Green	A. B. Cox	Deputy Assessor	50%
Green	P. F. Marshall	County Court Clerk	50%
Hart	P. B. Moss	Farmer	50%
Harrison	E. F. Mason	Farmer	60%
Henderson	J. L. Ferrill	Deputy Assessor	60%
Henderson (2)	A. H. Abbott (L. & N.) (I. C.)	Sheriff (I. C. 40 to 60%)	60%
Henderson	Ben T. Kinsey	Farming	60%
Henderson	H. H. Williams	Jailer, Henderson Co	15% to 60%
Henderson	David Banks	Cashier, Union B. & T. Co	15% to 60%
Henderson	Robert E. Johnston	Teller, Henderson Nat. Bk	15% to 60%
Henderson	G. W. Crutcher	Cashier, Hend. Co. Sav. Bk	25% to 60%
Henry	S. J. Douthitt	Farmer and Ex-Circuit Clerk	60%
Henry	J. V. Pearce	Ex-Assessor	60%
Henry	S. Bruce	County Judge	60%
Henry	W. G. List	Farmer	60%
Henry	M. J. Jones	Farmer and Ex-Circuit Clerk	60%
Henry	S. T. Douthitt	County Court Clerk	60%
Henry	W. S. Magruder	Farmer	60%
Hopkins	C. S. Williams	Deputy Tax Collector	33⅓%
Jefferson	P. S. Ray	County Court Clerk	60%
Jefferson	John Buechel	(Statement) City Assessor	60%
Jefferson	John Buechel	City Assessor	60%
Jessamine	N. R. Dickinson	Clerk, County Court	80% first, 60% after first Personal 40% to 50%
Jessamine	Anderson Jacobs	Deputy Sheriff	80% first, 60% after first Personal 40% to 50%
Laurel	H. M. Whitaker		
Laurel	J. W. Moren	Ex-Sheriff	60%
Laurel	Geo. G. Brock	Lawyer	50% to 60%
Laurel	J. N. Landrum	Farmer and Merchant	50% to 60%
Larue	M. L. Meers	Pres., Larue Nat'l Bank	60%
Lee	Henry Brandenburgh	Barber and Ex-Member Board of Supervisors	60% to 70%
Lee	G. W. Cann	Circuit Clerk and Ex-County Court Clerk	60% to 70%
Lee	C. B. Lovelace	County Court Clerk	60% to 70%
Lee	Chas. Eveleth	Does not state	60% to 70%
Lee	Thomas Pryse	Ex-Trustee Jury Fund	60% to 70%
Lee	G. T. Perkins	Ex-Mem. Brd. Supervisors	60% to 70%

COUNTY.	NAME OF AFFIANT.	OCCUPATION.	PERCENTAGE OF ASSESSMENT.
Lee	H. T. Beatty	County Attorney	60%
Lee	Ibzam McGuire	Ex-Sheriff, Assessor and Judge	60%
Lee	W. H. C. Seale	Ex-Assessor	60%
Logan	G. B. Hutchings	Liveryman, R. E. A. and Farmer	60%
Logan	Summers Dean	Farmer	60%
Logan	W. A. Dockins	Tobacco Buyer and Ex-Farmer	60%
Logan	Ed. Johnson	Hardware and Ex-Farmer	60%
Lyon	J. V. Smith	Farmer and Banker	50% to 60%
Lyon	W. N. Cummins	Banker	50% to 60%
Lyon	T. P. Gray	County Judge	50% to 60%
Lyon	U. S. King	County Court Clerk	50% to 60%
Lyon	Sam G. Cash	Farmer	50% to 60%
McLean	W. N. Short	Farmer	30%
McLean	D. E. Bell	Farmer	35%
McLean	John R. Priest	County Court Clerk	30%
McLean	C. E. Beeler	Sheriff	35%
McLean	J. T. Higgs	County Judge	50%
Marion	Clem Johnson	City Assessor, Lebanon	60%
Marion	Sam J. Spalding	County Court Clerk	50% to 60%
Marion	Herndon Goodin	Deputy County Crt. Clerk	55% to 60%
Marion	Charles L. Hunter	Ex-City Assessor, Lebanon	60%
Marion	Charles C. Boldrick	City Attorney, Lebanon and Member County Board Suprs	55% to 60%
Marion	A. Kelly	Ex-Member City Board Supervisors	80% on first transfer, 70%—1913, generally assessed at 55% to 60%
Muhlenberg	D. M. Roll	Deputy Sheriff	60%
Muhlenberg	D. M. Roll (I. C.)	Deputy Sheriff	50%
Muhlenberg	J. C. Stokes	Deputy City Marshall, Greenville, Ky	60%
Muhlenberg	H. C. Lewis	Bank Cashier	60%
Muhlenberg	H. C. Lewis (I. C.)	Bank Cashier	50%
Muhlenberg	W. D. Blackwell	Insurance Business	50%
Muhlenberg	W. D. Blackwell (I. C.)	Insurance Business	50%
Muhlenberg	G. M. York	Jailer	50% or 60%
Muhlenberg	C. E. Blackwell	Chief Police, Greenville, and Ex-Deputy Assessor and Deputy Sheriff	30% to 40%
Nelson	W. J. Roby	Deputy County Clerk	Sets forth a number of transfers, giving consideration and assessed value.
Nicholas	Wm. Conley	Attorney at Law and Judge of County Court	50%
Nicholas	W. E. Darragh	County Attorney	50%
Nicholas	Jas. Mitchell	Farmer	50%
Nicholas	Jno. F. Sugg	Clerk, County Court	50%
Nicholas	E. J. Secrest	Farmer	50%
Ohio	A. C. Yeiser	General Insurance Agent	50%
Ohio	S. J. Weller	Banker, Dundee Deposit Bk	60%

COUNTY.	NAME OF AFFIANT.	OCCUPATION.	PERCENTAGE OF ASSESSMENT.
Ohio	R. T. Collins	Clerk, City Council of Hartford and Trustee Jury Fund	60%
Oldham	H. C. Hudson	Farmer and Stock Trader	60%
Oldham	W. D. Pinkston	Clerk, County Court	80% first, 60% after first
Oldham	D. H. French	Attorney at Law	60%
Pendleton	G. H. Fossitt	Ex-County Judge	60%
Pendleton	C. W. Carnes	Ex-Sheriff, Deputy Sheriff and Ex-Treasurer	60%
Perry	E. D. Campbell	Farmer and Ex-Member Board of County Supervisors	50%
Perry	Robert D. Combs	Ex-Deputy Sheriff and Ex-Town Marshall of Hazard	60%
Perry	Lewis Feltner	Ex-Assessor and Dep. Assessor	60%
Powell	Luther Stephens	Farmer and Ex-Assessor and Ex-Member Brd. Supervisors	60%
Powell	W. G. Frazier	Ex-County Clerk and Deputy Assessor and Dep. County Clerk and Clerk Brd. Supervisors	50%
Rockcastle	T. J. Nicely	Sheriff and Tax Collector	50% to 60%
Rockcastle	G. S. Griffin	Deputy Sheriff and Farmer	50% to 60%
Shelby	C. S. Weakley	Master Commissioner, Shelby Circuit Court	80% first, 60% after first
Shelby	Ed. D. Shinnick	Editor, Shelby Record	80% first, 60% after first
Shelby	H. A. Campbell	Ex-Sheriff, Deputy Sheriff and Ex-Assessor	80% first, 60% after first
Shelby	E. J. Doss	Ex-County Clerk and Surveyor	80% first, 60% after first
Shelby	W. H. Tipton	Does not state	60%
Shelby	J. L. Smith	Deputy Sheriff	80% first, 60% after first
Simpson	J. R. Gossett	Sheriff	25% to 33⅓%
Simpson	R. A. Evans	Deputy Assessor	25% to 33⅓%
Simpson	E. S. Bradshaw	County Judge	One-fourth to one-half
Simpson	M. S. Harris	Cashier, Simpson Co. Bank	One-fourth to one-half
Simpson	J. H. Covington	V. P. The McElwain-Maguire Bk. & Trust Co.	One-fourth to one-half
Taylor	J. E. McFarland	Tax Collector	60%
Taylor	C. W. Wright	Ex-Tax Collector and Ex-County Court Clerk	30% to 60%
Taylor	G. W. Hord	Farmer, Owner and Manager Farm Lands	40% to 60%
Taylor	W. G. Gilpin	Farmer and Agent	40% to 60%
Taylor	Edward Hill	Merchant	40% to 60%
Taylor	J. H. Miller	Fertilizer—wholesale and retail	60%
Taylor	Frank Bowles	Farmer	60%
Todd	Lucian Lindsey	Sheriff	80% first, 50% after first
Todd	S. H. Perkins	Banking	80% first, 50% after first
Todd	W. S. Shelton	Tobacconi	80% first, 50% after first
Todd	D. M. Butler	Tobacconist	80% first, 35% to 50% after first
Todd	H. C. Miller	Hwd. and Implements	80% first, 50% after first

COUNTY.	NAME OF AFFIANT.	OCCUPATION.	PERCENTAGE OF ASSESSMENT.
Todd	B. B. Butler	Farmer	80% first, 35-50% after first
Todd	J. F. Kirkman	Dry Goods	80% first, 35-50% after first
Union	T. B. Young	Ex-Member Board of Tax Supervisors	50%
Union	A. W. Clements	Road Supervisor and Farmer, Ex-Sheriff, County Judge	50%
Union	L. C. Flournoy	Ex-Judge, County Court	50%
Warren	N. R. Strange	Ex-Assessor	60%
Warren	W. C. Hall	Ex-Assessor	60% to 65%
Warren	W. H. Myers	Assessor	60% to 65%
Warren	J. W. Hendricks	Assessor, Bowling Green	50% to 60%
Webster	L. B. Vaughan	Sheriff	50%
Webster	Cosby Campbell	Deputy Sheriff	50%
Webster	W. D. Edens	Farmer, Ex-Assessor	50%
Webster	D. W. Wiley	Representative 1912-13 to Ky. Legislature and Farmer	50%
Whitley	W. L. Moore	Member, Board of Supervisors, Ex-Deputy Sheriff	50% to 60%
Whitley	J. A. Stanfill	Clerk, County Court	Gives list of transfers with consideration.
Whitley	James Murphy	Deputy Sheriff	60%
Whitley	L. M. Lay	Assessor	50% to 60%
Whitley	J. L. Manning	Ex-Sheriff	50% to 60%
Whitley	Robert Monhollen	Ex-Deputy Assessor and Real Estate Agent	60%
Whitley	S. R. Sutton	Ex-Assessor and Ex-Deputy Assessor	50% to 60%

798 The forms of said affidavits are substantially shown by the following examples:

The affidavit of Ben T. Kimsey of Henderson County was as follows:

"STATE OF KENTUCKY,
County of Henderson.

Affiant Ben T. Kimsey states that he is a citizen and resident of the above named county, having lived in it for about 45 years; that his occupation is farming in Henderson County; that he is well acquainted with the location and value of real estate, including farm lands and town lots, in said county, that he is now and was during the years 1883 to this time familiar with the practice of assessing property for state and county taxation in said county; that it is now and has been for said years the rule and custom in said county to list and assess for taxation in said county personal property and real estate, including farm lands and town lots, at sixty per cent of their fair cash value, estimated at the price they would bring at a fair voluntary sale; that said assessments are and were intentionally, habitually, uniformly and systematically made at the above named rate, and said percentages are not and were not during said named period exceeded after the action of the county board of equalization with respect to said lands and town lots thereon—in other words, the assessments finally made by the county authorities did not and do not exceed 60 per cent of the real value of the property assessed after the county board of equalization has passed thereon.

BEN T. KIMSEY.

Subscribed and sworn to before me this 14th day of November, 1913.

[SEAL.] E. B. CARR,
Notary Public, Henderson County, Ky.

My commission expires at the end of the next session of the Senate."

The affidavit of S. J. Douthitt of Henry County was as follows:

"The affiant S. J. Douthitt, states that he is 52 years of age, and a resident of Henry County, Kentucky, having been born and raised in said County and having lived therein all his life.

He states that he is engaged in farming, and that for 16 years he was Circuit Court Clerk of Henry County, Kentucky.

He says that he is familiar with the values of land, town lots and personal property (subject to equalization) in Henry County; that he also is familiar with the assessment of such property for taxation in a general way. He states that for many years last past that the lands, town lots and personal property (subject to equalization) in Henry County, Ky., have been listed and assessed for taxation for state and county purposes at a valuation not exceeding sixty per cent (60%) of its fair cash value at a voluntary sale thereof.

He states that he has examined the assessment made as to date Sep. 1st. 1912, for taxes for the year 1913, and that from his examination and knowledge of said assessment, as finally completed, revised and equalized by the Board of Supervisors for Henry County, the lands, town lots and personal-ty, subject to equalization, listed and assessed therein does not exceed 60% of the real and fair cash value of said property at a fair and voluntary sale thereof.

He says that it has long been a general and recognized custom of the residents and property holders of Henry County, Ky., 799 to list their property for taxation at a valuation not exceeding 60% of its fair cash value, and that a list for taxation at 60% of the fair cash value at a voluntary sale, *as* uniformly, intentionally and generally recognized and treated as a fair and just list of said property for purposes of taxation for state and county.

Affiant says that the statements contained in the foregoing affidavit are true as he verily believes.

(Signed.) S. J. DOUTHITT.

Subscribed and sworn to before me this 12th day of November, 1913.

S. F. DOUTHITT,
Clerk Henry County Court."

The affidavit of the witness L. B. Vaughn of Webster County was as follows:

"STATE OF KENTUCKY,
County of Webster.

Affiant, L. B. Vaughn, states that he is a citizen and resident of the above named county, having lived in it for thirty years; that his occupation is sheriff of said county; that he is well acquainted with the location and value of real estate, including farm lands and town lots, in said county, that he is now and was during the *years* past 20 years familiar with the practice of assessing property for state and county taxation in said county; that it is now and has been for said years the rule and custom in said county to list and assess for taxation in said county personal property and real estate, including farm lands and town lots, at not over fifty per cent of their fair cash value, estimated at the price they would bring at a fair voluntary sale; that said assessments are and were intentionally, habitually, uniformly and systematically made at the above named rate, and said percentages are not and were not during said named period exceeded after the action of the county board of equalization with respect to said lands and town lots thereon—in other words, the assessments finally made by the county authorities did not and do not exceed fifty per cent of the real value of the property assessed after the county board of equalization has passed thereon.

He says he is now sheriff of said county.

L. B. VAUGHN.

Subscribed and sworn to before me by L. B. Vaughn, on this the 14th day of November, 1913. My commission expires on the 9th day of January, 1916.

N. B. HUNT,
Notary Public, Webster County, Kentucky."

The affidavit of the witness C. S. Weakley was as follows:

"C. S. Weakley says that he is the Master Commissioner of the Shelby Circuit Court and has been for four years; that he has lived in Shelby County all of his life; is a large land owner, and has owned land in various parts of this county. He says that he is acquainted with the manner of assessment of real property for taxation in Shelby County, Ky.; that the first year after the sale of property, it is usual and customary to assess it at 80% of the purchase price; after that, it is assessed at not more than 60% of its real value, which assessment is approved by the Board of Supervisors, and that after the first year, it is usual and customary and almost universal that property shall be taxed at 60% or less
800 of its real value.

(Signed) C. S. WEAKLEY.

Subscribed and sworn to before me by C. S. Weakley this November 11th, 1913.

F. R. WRIGHT, *Clerk*,
By R. M. TIPTON, *D. C.*"

Plaintiff also read in evidence the affidavit of John Buechel, Assessor of the City of Louisville, as follows:

"The affiant, John Buechel, states that he is the duly elected assessor of the City of Louisville, Kentucky, and has held such office during the years 1910, 1911, 1912, and 1913, and that he was reelected by the General Council on the 14th day of November, 1913, for the succeeding four years.

Affiant further states that when he first assumed the office of City Assessor he found that the State and National Banks and Trust Companies of said City of Louisville, Ky., were being assessed for franchise taxation on an equalized basis of sixty percent of their total value, and he also states that the equalized assessments of the aforesaid corporations for each of the years 1910, 1911, 1912, 1913 and 1914, based on their reports as of September first of the respective preceding years, were all made on a sixty percent basis, although he had endeavored in 1910 and again in 1913 to have said assessments raised to an eighty percent basis, but that in each instance the City Board of Equalization had reduced, over his protest, his tentative assessments, which had been made on an eighty percent basis, to a sixty percent basis.

Affiant further states that the method pursued in arriving at the assessments of the aforesaid State and National Banks and Trust Companies for each of the years aforesaid, was as follows:

To the par value of the capital stock of each of said banks and trust companies was added its surplus and undivided profits, if any, thus arriving at the total value of each of the said banks and trust companies respectively; then these total values so ascertained were equalized or reduced to a sixty percent basis, and then from these several equalized values were deducted the assessed values of the tangible property, if any, of each bank or trust company respectively, the several remainders being treated as the equalized assessed values of their respective franchises.

Affiant further states that the aggregate value of the several state and National Bank and Trust Companies of the City of Louisville, Kentucky as of September 1st, 1913, arrived at by adding the surplus and undivided profits to the par value of the capital stock thereof, was $15,795,545.00

and that this amount was equalized at sixty per cent producing the sum of..... 9,477,327.00

from which latter amount was deducted the aggregate assessed value of their tangible property amounting to..... 1,104,025.00

leaving the sum of..... $8,373,302.00

as the aggregate of the equalized assessment of the franchise of the several state and national bank and trust companies of the City of Louisville, Kentucky, as of the fiscal year stated.

And affiant further states that the aggregate value of the several state and national bank and trust companies of the City of Louisville, Kentucky, as of September 1st, 1912, was arrived at by the same method, and that the amount so ascertained was likewise equalized at sixty percent, and from the result so obtained was deducted the aggregate assessed value of their tangible property, leaving the sum of..... $8,092,808.00

801 as the aggregate of the equalized assessments of the franchises of the several state and national bank and trust companies of the City of Louisville, Kentucky, as of the fiscal year stated.

Affiant further states that $1.76 on each $100.00 was the City tax rate for the year 1913, and that the same rate has been decided upon for the year 1914.

(Sig.) JOHN BUECHEL,
City Assessor of Louisville, Kentucky.

Subscribed and sworn to before me at Louisville, Kentucky, this 18th day of December, 1913.

J. P. DUFFY,
N. P., Jefferson Co., Ky.

My commission expires 3/7/1916."

Plaintiff also read the statement of Charles J. Veling, Chief Clerk of the Corporation Department in the Office of Auditor of Public Accounts, showing taxable values as to property in the State of Kentucky for the year 1913, as follows:

"DECEMBER 10, 1913.

Total Taxable Value of Property in the State of Kentucky as Assessed for Taxation Year 1913, *and % Value of Each Class.*

Total value of all taxable property	$1,125,892,725.00	
Value of Lands and Personalty	$852,547,141.	%.7581
Value Miscell. Corporations	31,576,400.	%. 028
Distilled spirits	38,832,984.	%.0343
Railroads and Bridges	168,436,200.	%. 149
Banks and Trust Companies	34,500,000.	%.0306
		%. 100

CHAS. J. VELING,
Chief Clerk Corporation Department."

The foregoing was all of the evidence introduced on behalf of the plaintiff.

802 The following evidence was introduced by the defendants: (in addition to that introduced on the hearing before the Board of Valuation and Assessment, which has heretofore been set forth).

Defendants read in evidence as a deposition (under stipulation) the following affidavit of H. M. Bosworth:

803 In the District Court of the United States for the Eastern District of Kentucky.

In Equity. No. —.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
versus
H. M. BOSWORTH et al., Defendants.

Affidavit of H. M. Bosworth.

The affiant, H. M. Bosworth, says he is Auditor of Public Accounts for the State of Kentucky, and that Thomas S. Rhea is the Treasurer of the State of Kentucky and C. F. Crecelius is Secretary of the State of Kentucky, and that said affiant, said Rhea and Crecelius constitute the Board of Valuation and Assessment of the State of Kentucky, organized and created under the laws of said State for the purpose of assessing the franchises of all Railway Companies operating lines of railway within and without the State.

The affiant says that on the 26th day of June, 1913, that said Board at a regular meeting thereof, made a tentative assessment on the franchise of Complainant herein, for the year 1913; the order making said assessment which was placed upon the minutes of said Board *and* is in words and figures as follows, towit:

At a meeting of the Board of Valuation and Assessment of the Commonwealth of Kentucky, held in the Capitol Building in Frankfort, Franklin County, Kentucky, the 26th day of June, 1913, the following order was made by said Board and directed to be recorded:

Whereas, the Board of Assessment and Valuation, this day met pursuant to the call of the Chairman, for the purpose of fixing the tentative valuation of the franchise of the various railroads operating lines of railway within the State of Kentucky, and subject to
804 a franchise tax thereon, the said Board, in session, after consideration of the report and the statements therein contained, which were made to the Auditor as of June 30, 1912, by Louisville and Nashville R. R. Co., and the report made pursuant to the Statutes of Kentucky by the officers of said Company to the Kentucky Railroad Commission for the year ending June 30th, 1912, and the statistics of common carriers compiled by the Interstate Commerce Commission for the year ending June 30th, 1912, and the report of the directors of said corporation, to the stockholders thereof, and upon consideration of the gross and net earnings of said company, and the mileage thereof, owned, operated, leased and controlled within and without the State of Kentucky, and the value of the shares of stock and the bonds of said company, the Board reached the conclusion that the fair cash value of capital stock of Louisville and Nashville R. R. Co. in Kentucky, for the purpose of taxation for the year 1913, is $76,000,000.

Therefore, Be it ordered, that the value of the capital be now fixed at said sum of $76,000,000, and from this sum there is deducted the sum of $28,806,072, the value of all tangible property of said company assessed in this State, or in the counties where situated, and the remainder, towit: $47,193,928, is adjudged to be the tentative assessible value of the franchise of the Louisville and Nashville R. R. Co. in Kentucky, subject to taxation for the year 1913.

Ordered: That said corporation be at once notified so that it may show cause, if any it has or can, why said tentative assessment should not be made final.

Upon the question of the adoption of this foregoing order, upon roll call, Auditor Bosworth voted "aye." Treasurer Rhea voted "aye," and Secretary of State Crecelius voted "aye."

H. M. BOSWORTH, *Chairman.*
CHAS. J. VEILING, *Sec'y.*

The affiant says thereafter, towit, on July 15, 1913, he received from the Honorable W. A. Colston, General Solicitor for Complainant, a letter in words and figures as follows, towit:

39640.

JULY 15, 1913.

Assessment of Franchise of the Louisville & Nashville Railroad Company for 1913.

Hon. H. M. Bosworth, Auditor of Public Accounts, Frankfort, Kentucky.

DEAR SIR: With reference to corrected statement issued from your office on June 28th, 1913, the tentative assessment of the value of the Franchise of this Company for taxes for 1913, it is our purpose to file with you a written protest and request for a change and reduction of the valuation.

The tentative assessment, of which notice has been given, is, in our opinion, excessive, unreasonable, unjust, and illegal, and in order that we may be enabled to appear before the Board and introduce evidence showing specifically, fully, and intelligently the errors in calculations, valuations, and apportionments made by the
805 Board in reaching said tentative assessment, and in order that we may be afforded a full hearing, as contemplated by law, I request that you furnish me by return mail with a statement showing the principle on which the Board proceeded, or the mode or manner employed by it in estimating the value of the Company's franchise.

I understand on an attempt by one of this Company's representatives to ascertain by examination of the jacket or papers in your office pertaining to such assessments how the calculations were arrived at, he was informed that you had given instructions not to permit access to these papers by any agent or representative of the corporation assessed.

I have deemed it proper, therefore, to make the request on you for information in this respect as above set forth.

Very respectfully,

(Signed) W. A. COLSTON,
General Solicitor.

Copy to Mr. R. E. Fleming, Special Attorney.

That on July 17th 1913, affiant mailed to the Hon. W. A. Colston a letter in reply thereto in words and figures as follows, towit:

State of Kentucky.

Office Auditor of Public Accounts.

FRANKFORT, July 17, 1913.

Hon. W. A. Colston, General Solicitor L. & N. R. R. Co., Louisville, Ky.

DEAR SIR: I have received your letter of July 15th, in reference to the tentative assessment of the value of the franchise of the Louisville and Nashville Railroad Company for taxes for the year 1913, in

which you state "on an attempt by one of this Company's representatives to ascertain by examination of the jacket or papers in your office pertaining to such assessment how the calculations were arrived at, he was informed that you had given instructions not to permit access to these papers by any agent or representative of the Corporations assessed."

I beg to inform you that no such instructions were given by me to any one connected with my office, and now wish to advise you that the records of my office are now and at all times during business hours available to any representative of your Company.

Mr. Robert E. Fleming, one of the Attorneys of your Company, has an engagement with the Attorney General and Mr. Rich of my office tomorrow, and I hope to be present, at which time we will be glad to give Mr. Fleming all the facts that were considered by the Board and the information before it when the tentative assessment of your Company was made.

In reply to your request that I furnish you by return mail with a statement showing the principle on which the Board pro-
806 ceeded, or the mode or manner employed by it in estimating the value of this Company's franchises, I beg to advise you that in arriving at the total value of the capital stock or assets of your Company, I considered the value of your outstanding shares of stocks and bonds and capitalized the net income of your Company for the year on the basis of six per cent.

In estimating and determining the proportion thereof subject to taxation in Kentucky, I considered the ratio of operated mileage in Kentucky to the operated mileage within and without Kentucky and the ratio of the operated leased and controlled mileage in Kentucky to the operated leased and controlled mileage within and without Kentucky, and the ratio of gross and net earnings within Kentucky to the gross and net earnings within and without Kentucky as stated in your report to the Kentucky Railroad Commission for the year ending June 30, 1912.

The ratio 'operated' and 'operated and controlled' mileage was obtained from the testimony of Mr. H. F. Thompson given before the Board last year.

The corporate income of the Company was ascertained from the report of your Company to the Auditor made as of June 30, 1912, from the report of the directors of the Company to the stockholders of the same date, and from a publication issued by the Interstate Commerce Commission entitled, 'A preliminary Abstract of Statistics of Common Carriers for the year ended June 30th, 1912."

Inasmuch as the assessment in question is merely tentative, and subject to change or correction if any injustice has been done, I am wholly unable to understand why you inquire with such particularity as to the mode or method employed by the Board in arriving at the assessment made.

Upon a hearing, which the Board must give your Company, as to the correctness of this assessment, your representatives will be given a full opportunity to be heard and present all the facts relative to the

value of your franchise and to fully express your views as to the mode or method of ascertaining the value of same.

Very respectfully,

(Signed) H. M. BOSWORTH, *Auditor.*

That within thirty days after June 26th, 1913, the date on which the tentative assessment of complainant's franchise was made, the complainant filed with affiant its protest in writing against said assessment and the hearing thereon was continued from time to time until October 23, 1913.

Upon said day the Complainant appeared by counsel before the Board of Valuation and Assessment to begin its hearing on the tentative assessment theretofore made, and the members of said Board thereupon delivered to counsel for Complainant the following response to the protest theretofore filed by it. Said response is in words and figures as follows, towit:

807 The Louisville & Nashville Railroad Company:

In response to the prayer of your protest filed before us as constituting the State Board of Valuation and Assessment, we beg to state to you that in arriving at the tentative assessment of your property for this year, we were not governed by any particular rules, as it was our intention to fix the value of your property approximately, and to go more into details in making the final assessment after hearing all the proof offered by you.

We beg to say, however, that we found your capital stock to be approximately $264,000,000, by capitalizing the net income of your road at six per cent. We apportioned to Kentucky that proportion of this sum which the operated mileage in Kentucky bears to the operated mileage in Kentucky and elsewhere, and found that by following this plan the value of the total capital stock in Kentucky would be approximately $90,000,000. We also found that the capital stock of the operated roads belonging to your Company on the stock and bond plan amounted to $226,000,000, in round numbers. After taking into consideration the roads in which your Company owns a controlling interest, which roads are the Nashville, Chattanooga & St. Louis, the Chicago, Indianapolis & Louisville, the South & North Alabama, the Georgia Railroad, and the Louisville, Henderson & St. Louis, we found, by referring to Poor's Manual, that the assets of these roads aggregate in round numbers $110,000,000, which, when added to the $226,000,000, gives the total capital stock of your road as of the value of $336,000,000 in round numbers, and we apportioned to Kentucky of this sum the proportion that the roads operated, owned, leased and controlled in Kentucky bears to the roads owned, operated, leased and controlled in Kentucky and elsewhere, and found that this gave the value of the capital stock in Kentucky at approximately $85,000,000.

From these calculations, we were of the opinion that the value of the capital stock of your Company in Kentucky would be as much as $76,000,000, after making all necessary deductions and equalizing with other property assessed by this Board, and it was in this way

and for this reason that we fixed the value of the capital stock of your Company in Kentucky at $76,000,000, as a tentative assessment. This tentative assessment was made prior to the decision of Judge Cochran in the case involving the assessment of your Company last year, and since his decision, we feel it incumbent upon us to follow as nearly as possible the principles which he thinks should be followed in assessing your road, and if we do that, it necessarily means that we must possibly depart to some extent from the figures submitted above.

We are of the opinion that in making the assessment in accordance with the opinion of Judge Cochran, that it might be done in the following manner: We will suppose for instance, that the total capital stock of your company is $264,000,000, and that the entire tangible property of your company is $177,000,000. If we should apportion the tangible property to Kentucky by taking the proportion that the lines owned, operated, leased, and controlled in Kentucky bears to the lines owned, operated, leased, and controlled in Kentucky and elsewhere, we would find that the value of the tangible property apportioned to Kentucky would be, in round numbers, $44,250,000. Suppose that the Board should be of the opinion from the affidavit of Milton H. Smith, the President of your Company, filed in the case of your Company against Siler, late pending in the Federal Court for the Eastern District of Kentucky, that the tangible property belonging to your Company in the State of Kentucky was of the value of $70,000,000, or suppose that we should come to the conclusion from any other reliable evidence, that the value of your tangible property in Kentucky is $70,000,000, we would find that in order to ascertain the proper amount of excess value in the tangible property in Kentucky, it would be necessary to subtract from
808 the $70,000,000 the amount which was found by apportioning to Kentucky on the basis aforesaid, and we would find that the excess value would be about $25,750,000, which, when added to the $44,250,000, would give a total of $70,000,000 as the value of the tangible property of your Company in Kentucky.

Having found that the value of the tangible property in Kentucky belonging to your Company is $70,000,000, it would then remain for us to find the value of your intangible property in Kentucky. If your total capital stock should be $264,000,000, and the value of your tangible property should be $177,000,000, it necessarily follows that the value of your intangible property would be $87,000,000. If we should apportion to Kentucky on the proportion that the lines owned, operated, leased, or controlled in Kentucky bears to the lines owned, operated, leased, or controlled in Kentucky and elsewhere, we would get approximately $22,000,000 as the value of the intangible property in Kentucky, which we would add to the $70,000,000, and in this way we would find the value of your capital stock in Kentucky to be $92,000,000. This amount would be increased a million or more dollars by figuring out the sum exactly. If we should follow literally Judge Cochran's opinion, we would take the percentage that the gross income in Kentucky bears to the gross income in Kentucky and elsewhere at the proper proportion between the value of the in-

tangible property in Kentucky and elsewhere. If we should use this proportion, we would find that Kentucky's share of the intangible property is, in round numbers, $35,000,000, which when added to the $70,000,000 would give the total value of your property in this State as $105,000,000.

We have made these suggestions to you showing what we think will have much influence with us in making the final assessment, and to that end we expect you to furnish us full information as to the value of your tangible and intangible property in this State, and especially as to whether it has increased in value since 1905, or whether it has decreased, and if it has increased, we expect you to show us in what manner, and if it has decreased, we expect you to show us in what manner.

Trusting that these suggestions will aid you in properly presenting your side of this question to us, we beg to remain,

Yours truly,

H. M. BOSWORTH,
Auditor.
THOS. S. RHEA,
Treasurer.
C. F. CRECELIUS,
Secretary of State.

Thereupon the Complainant moved the Board to quash the notice theretofore given of its tentative assessment and moved the Board to make its notice of the tentative assessment of Complainant's franchise for the year 1913 more definite and certain; and thereupon, towit: October 23, 1913, said Board prepared and mailed to Complainant the following notice in words and figures as follows, towit:

809 State of Kentucky.

Office of Auditor of Public Accounts.

FRANKFORT, KENTUCKY, October 23, 1913.

To the Louisville & Nashville Railroad Company:

The State Board of Valuation and Assessment for the State of Kentucky begs to notify you that, after a consideration of your report to the Auditor of date June 30, 1912, for taxes for the year 1913, and after a consideration of other evidence hereinafter mentioned, we have fixed the capital stock of the Louisville and Nashville Railroad Company in Kentucky at the valuation of $76,000,000, and we have deducted therefrom the assessed value of your tangible property in Kentucky, towit: $28,806,072, which leaves the value of your franchise $47,193,928.

We beg to state to you that in making this tentative assessment of your property for said year, we were not governed by any particular rules, as it was our intention to fix the value of your property in this State approximately, and to go more into details in making the final assessment after hearing all of the proof that you

had to offer, if any, and after a consideration of such other legal proof as might be brought before us.

We beg to state, however, that we found the net income of your road to be approximately $15,840,000, which, by capitalizing same at six per cent gave us as the total value of your entire capital $264,000,000. We apportioned to Kentucky that proportion of this sum which the operated mileage in Kentucky bears to the operated mileage in Kentucky and elsewhere, approximately 34 per cent, and found that by following this plan, the value of the total capital stock in Kentucky of your road would be approximately $90,000,000.

We also found on the stock and bond plan that the capital stock of the operated roads belonging to your company amounts to $226,000,000, in round numbers. We also ascertained that your company owns a controlling interest in the Nashville, Chattanooga & St. Louis Railroad, the Chicago, Indianapolis & Louisville Railroad, and the Louisville, Henderson & St. Louis Railroad, and by referring to Poor's Manual, we found that the total assets of these roads, in round numbers, amounts to $110,000,000, which, when added to the $226,000,000, gives the total capital stock of your road as of the value of $336,000,000, in round numbers, and we apportioned to Kentucky of this sum the propertion that the roads operated, owned, leased, and controlled in Kentucky bears to the roads owned, operated, leased, and controlled in Kentucky and elsewhere, which is about 25 per cent, and found that this gave the value of the capital stock in Kentucky at approximately $85,000,000.

From these calculations, we were of the opinion that the value of the capital stock of your company in Kentucky would be as much as $76,000,000, after making all necessary deductions and after equalizing with other property in this State which is assessed by this Board, and it was in this way and for this reason, that we fixed the value of the capital stock of your company in Kentucky at $76,000,000 as a tentative assessment.

This tentative assessment was made prior to the decision of Judge Cochran in the case involving the assessment of your company last year, and since his decision we feel it incumbent upon us to follow as nearly as possible the principles which he thinks should be followed in assessing your road.

840 Since giving you the original notice, you have appeared before us and entered a motion that the notice be quashed because same is not sufficient under the decision of Judge Cochran, and after consideration, we sustained your motion and quashed said notice, and since quashing said notice, we have again considered the same matters above referred to, and have arrived at the same conclusion that we arrived at at the time we gave you the original notice which was quashed. We have also attempted to follow the opinion of Judge Cochran in making this tentative assessment and before giving you this notice, and using as your total capital stock the valuation of $263,000,000, we have found that of this sum, according to your report to the Auditor, $177,000,000 is tangible property.

If we should apportion the tangible property to Kentucky by taking the proportion that the lines owned, leased, operated and controlled in Kentucky bears to the lines owned, operated, leased, and controlled in Kentucky and elsewhere, or approximately 25 per cent, we would find that the value of the tangible property apportioned to Kentucky would be, in round numbers, $44,250,000.

The Board has given consideration to the affidavit of Milton H. Smith, the president of your company, filed in the case of your company against Siler and others, late pending in the Federal Court for the Eastern District of Kentucky, and have also given consideration to your report of the net income and gross income derived from business done in Kentucky, as shown by your report to the Railroad Commission of Kentucky as of date June 30, 1912, and we find from a consideration of these matters, the value of your tangible property in Kentucky is as much as $70,000,000. Since we only obtained $44,250,000 by apportioning on the mileage basis above referred to, we find that by following this method the excess value of your tangible property in Kentucky is $25,750,000, which, when added to the $44,250,000, would give a total of $70,000,000 as the value of the tangible property of your company in Kentucky. If $177,000,000 is the value of your total tangible property, and $264,000,000 is the value of your total property, it necessarily follows that your intangible property is of the value of $87,000,000. If we should apportion to Kentucky on the proportion that the lines owned, operated, leased, or controlled in Kentucky bears to the lines owned, operated, leased, and controlled in Kentucky and elsewhere, which is about 25 per cent, we would obtain approximately $22,000,000 as the value of the intangible property in Kentucky, which, when added to the $70,000,000, the value of the tangible property would give as the value of your capital stock in Kentucky the sum of $92,000,000, which sum would be increased a million or more dollars by using the exact proportions instead of the approximate proportions.

If we should follow literally Judge Cochran's opinion, we would take the percentage that the gross income in Kentucky bears to the gross income in Kentucky and elsewhere, as the proper proportion between the value of the intangible property in Kentucky and elsewhere, which is approximately about 40 per cent, and using this proportion, we would find that Kentucky's share of the intangible property is in round numbers $35,000,000, which, when added to the $70,000,000, would give the total value of your property in this State as $105,000,000.

We beg to advise you that it was from a consideration of these matters mentioned that led us to fix the value of your total capital stock in Kentucky at $76,000,000, and in doing so we considered that we had made all necessary deductions, and that we had equalized your property so that it was not assessed any higher for taxation than other property assessed by this Board, and we also beg to suggest to you that these things will have much influence
811 with us in making the final assessment, and to this end we expect you to show us upon final hearing whether or not we

have your net income correctly stated, and whether the value of your property in this State has increased or decreased since the year 1905, and if it has decreased or increased, we shall expect you to show us in what respect, and to what amount. We shall also expect you to show us the value of the assets of the roads which are controlled by you, as well as any other information that will aid us in giving proper consideration to the assessment of your property.

In conclusion, we beg to state that the State Board of Valuation and Assessment has had the report of your corporation for June 30, 1912, for the taxes of 1913, under consideration, and has assessed the value of your franchise as follows:

Capital stock	$76,000,000
Less amount of tangible property assessed for taxes in this State	28,806,072
Value of franchise	47,193,928
Tax at 50 cents on each $100	235,968.64

Under the law you will have thirty days in which to appear before the Board to introduce evidence and ask for a change in the assessment. Should the thirty days expire without a protest, this assessment becomes final.

Yours truly,

H. M. BOSWORTH, *Auditor.*

Make checks payable to State Treasurer, but mail to this office.

And thereafter, towit, on November 14, 1913, the Complainant filed another and an additional protest and petition for a change and reduction of said assessment and valuation of its franchise for taxation in the State of Kentucky for the year of 1913. Said protest contained inter alia the following interrogatories propounded to the Board:

(*a*) Was the value of the total capital stock or entire property, tangible and intangible, in this State and elsewhere of the Louisville and Nashville Railroad Company arrived at by the Board in making its assessment on the stock and bond plan; that is to say, by taking the par or market value of the number of shares of stock and the par or market value of the total amount of the funded debt or mortgage bonds of that company issued and outstanding as of June 30th, 1912, or as of any other date?

(*b*) If the stock and bond plan was used, state the value fixed on such stock and how the same was arrived at and as of what date?

(*c*) If the stock and bond plan was used, state the par or market value placed on such funded debt or mortgage bonds and as of what date, and state what value was used, if any other value than the par or market value was used?

(*d*) State the total value arrived at on such stock and bond plan?

812 (*e*) Was the total value of the capital stock or property, tangible and intangible, in this State and elsewhere, of the

Louisville & Nashville Railroad Company arrived at in making the assessment on the capitalization of net earnings' plan?

(*f*) If so, state the amount of net earnings used in such capitalization and what items were taken and used to make up the same?

(*g*) Was the amount of net earnings used and employed in such capitalization intended to represent the net earnings or net income for the year ending June 30th, 1912, alone, or the average net earnings for a longer period than one year? If so, for what period and what are the amounts used for that purpose for each year and what was the average net earnings capitalized?

(*h*) At what rate or percentage was the amount of net earnings capitalized?

(*i*) What amount was thus obtained?

(*j*) On what basis was the total value of the capital stock or of the entire value of all the property of the Louisville & Nashville Railroad Company, tangible and intangible, apportioned to the State of Kentucky?

(*k*) What percentage was used and how was that percentage arrived at in apportioning to this State a share of the value of the entire capital stock or total value of property of that company, tangible and intangible?

(*l*) If such apportionment was made on a mileage basis, was the same on basis of operated mileage alone inside and outside of this State? State the number of miles so used outside and the number of miles inside this State for that purpose?

(*m*) Was, or not, the value of the tangible property of the Company located outside and inside this State ascertained and deducted from the total value of the capital stock or entire property before such apportionment to this State?

(*n*) Was or was not the total mileage operated, owned, leased, or controlled by the Louisville & Nashville Railroad Company inside and outside of this State used in fixing the value of the corporate franchise of that Company liable for taxation in this State?

(*o*) If such mileage was so used, state the number of miles operated, owned, leased, or controlled in this State and the total number of miles operated, owned, leased, or controlled in this State and elsewhere so used or considered in ascertaining and apportioning to this State its share of the total value of the capital stock or entire property, tangible and intangible, of said Company and what percentage of such total value was apportioned to this State?

(*p*) Please furnish a statement or copy showing the figures and calculations whereby the amount or share of the value of the total capital stock or entire property tangible and intangible, was apportioned to the State of Kentucky in making or fixing the assessment of the franchise of the Louisville and Nashville Railroad Company in this State?

(*q*) Please furnish a statement or copy showing the figures and calculations whereby the amounts of the capital stock or entire property, tangible and intangible, of the Louisville and Nashville Railroad Company in the State of Kentucky, was arrived at in

making or fixing said assessment of the franchise of said
813 Company?

(*r*) State what evidence beside the report made to the Auditor by the Louisville & Nashville Railroad Company as of June 30th, 1912, as the basis for the assessment of its franchise for 1913, was used or considered by the Board of Valuation and Assessment in making the tentative assessment of the Louisville & Nashville Railroad Company's franchise as per notice from the Auditor, dated June 28th, 1913, and if any other reports or records were considered, say what parts of those records and reports were considered and what calculations were made upon the basis of such evidence?

(*s*) Please furnish a statement of the calculations showing from beginning to end how the Valuation of petitioner's franchise was arrived at including the ascertainment of the total value of petitioner's capital stock, or the value of petitioner's property, tangible and intangible, wherever situated, any adjustments or equalization of or deductions from such values which were or are made, apportionment of such total value, or of the amount remaining from such total value after equalization, adjustments, or deductions to the State of Kentucky; equalizations, if any made, or deductions, if any made, from the part of the value apportioned to Kentucky, and all other calculations used in process of arriving at assessment made of the value of petitioner's franchise.

Thereafter the Board of Valuation and Assessment, towit: on November 17, 1913, delivered in writing to the counsel for Complainant the following answers to the interrogatories propounded by counsel for Complainant, which answers were in words and figures as follows, towit:

FRANKFORT, KENTUCKY.

Hon. H. L. Stone, Colonel W. A. Colston, Hon. R. E. Fleming, Attorneys for L. & N. Railroad Company.

MESSRS: In response to your communication of November 17, 1913, requesting answers to certain interrogatories therein contained we submit the following:

(*a*) A computation was made by finding the average selling price of the shares of this Company, and adding thereto the par or face value of its outstanding bonds as of June 30, 1912, in arriving at the entire value of the capital stock of this Company. This calculation shows the value of the capital stock of respondent to be $227,278,500. Because of the larger earnings of this Company this and previous years available for dividends to stock holders and as shown by its report to stock holders and to the Auditor, in our judgment the shares are worth more than their average market price during the year ending June 30, 1912, and for this reason the Board did not use or adopt the stock and bond plan to ascertain the value of the capital stock of respondent.

(*b*) $152.50 per share, the average selling price of the shares during the year ending June 30, 1912. The statute requires the

company to report to the Auditor the highest price at which the shares sold during the year.

814 (*c*) The outstanding funded debt was considered as being worth par; or its face value. We may state here that there is some question in our minds as to the total amount of the outstanding bonds or funded debt of this company. The report of respondent to its stockholders, and its report to the Railroad Commission of this State, states respondent has outstanding bonds in the hands of the public of the face value of $136,978,500; that of the remainder of its authorized issue in its treasury, $7,079,000 is deposited in trust as collateral. This statement is unexplained. If the company has borrowed money on these bonds, that is, used them as collateral for a loan and applied the money so obtained to its business, then such sum should be charged to capital stock of respondent in ascertaining the value thereof. We request you to give us an explanation of this entry. As the Board was not clear in its mind as to this transaction, these bonds were not taken into consideration.

(*d*) $227,278,500.

(*e*) Yes.

(*f*) The net earnings as shown by your report to stockholders, towit: $17,159,550. From this amount was deducted the rent of the Clarksville & Princeton branch, $12,039, and Paducah & Memphis division, $206,506; the dividend received by respondent on the stock it owns in the Chicago, Indianapolis & Louisville Railroad Company, towit: $236,830, and the dividend respondent received on the stock it owns in the Nashville, Chattanooga & St. Louis Railroad Company of $430,656, and the surplus of the South & North Alabama Railroad Company $639,581, which your report to stockholders shows was excluded from your surplus for the year ending June 30, 1912, with these deductions made from your total net income, the amount for capitalization was ascertained to be $15,633,935, which capitalized at 6 per cent shows the total value of the capital stock of respondent arrived at by this method to be $260,565,500. Other computations were made where the net earnings were taken as the basis of the calculation, all of which will be more fully set out herein.

(*g*) The net earnings, or income, for the year ending June 30, 1912, were used in these calculations.

(*h*) 6 per cent.

(*i*) $260,565,500, with all possible deductions allowed.

(*j*) The total value of the capital stock of the L. & N. Railroad Company as so found was apportioned to Kentucky on the basis of operated mileage in Kentucky to the operated mileage within and without Kentucky. The ratio of gross and net income of respondent in Kentucky was ascertained as an evidential bearing on the value of the mileage proportion or part of its property in Kentucky. To illustrate: If A owned a farm of 200 acres situated in two adjoining counties, 50 acres of which was in one county, and 150 acres, or the remainder thereof, in the other, 25 per cent of the land would be in one county and 75 per cent in the other. But

the 50 acres or 25 per cent of that farm might be equal in value to 40 per cent of the total value of the whole tract because of productivity and favorable location.

(*k*) The ratio of mileage in Kentucky was found to be 35 per cent. The ratio of gross income in Kentucky was found to be 38 per cent plus. These facts were ascertained from the report of respondent to the Railroad Commission of Kentucky made as of date June 30, 1912.

815 (*l*) The apportionment of the capital stock of the L. & N. Railroad Company was made on the operated mileage basis, that is to say, the miles of those companies in which this Company owns shares of stock, but which are operated under their separate management and are separately taxed, were excluded in the ascertainment of the ratio of the mileage in Kentucky to the mileage within and without Kentucky. The number of miles within and without Kentucky were obtained from the report of respondent to the Kentucky Railroad Commission of its mileage within and without Kentucky. The ratio of mileage in Kentucky as reported is 35 per cent plus in Kentucky. If upon the final hearing this ratio is found incorrect, correct ratio will be used in all computations used in arriving at final assessment. The tentative assessment is, in our opinion, neither binding on the State or Company, but can be lowered or increased as the evidence before the Board on final hearing shall justify. The gross earnings derived in this State and the gross earnings derived in and out of the State were obtained from the report of respondent to the Kentucky Railroad Commission of June 30, 1912. The ratio of gross earnings derived in Kentucky to gross earnings of the company within a*a*nd without Kentucky is 38 per cent plus.

(*m*) No, it was not.

(*n*) One of the computations made by the Board to ascertain the value of the franchise of the L. & N. Railroad Company embraced the entire mileage of the roads in which this Company owns shares of stock, in finding the ratio of mileage within and without the State. This ratio was ascertained from the testimony of H. F. Thompson given on the hearing of this Company in 1912. The ratio of such mileage in the State to that within and without the State was stated by him to be 25.44. In using this ratio, the total assets of those roads in which this company owns stock and claims to control said roads by reason thereo*n* were considered as the assets of the L. & N. Railroad Company. We hold that if the mileage of those roads are to be taken into account and consideration in finding the ratio of mileage in Kentucky to the mileage within and without Kentucky, the assets of those roads should also be considered in ascertaining the value of the capital stock of respondent. The Court of Appeals of this State so decided in the case of L. & N. Railroad, 149 Kentucky.

(*o*) The percentage of 25.44 so used was obtained from the source above stated. The Board asks you to furnish it with a statement showing the number of such miles of road owned, operated, leased and controlled within and without the State by those companies in which the L. & N. Railroad Company owns stock, and also furnish

the Board with information showing the value of the total assets or capital stock of said companies whose stock is owned by the L. & N. Railroad Company. The Board also desires to have you furnish it with the information showing the number of such miles in Kentucky and the number of such miles within and without Kentucky, and the ratio thereof in the State of Kentucky.

(*p*) Valuation No. 1.

Net income of the L. & N. Railroad as shown by report to the Auditor and to the stockholders for the year ending June 30, 1912, is	$17,159,550
Capitalized at 6%	285,992,500
Apportioned to Kentucky on mileage basis, 35%, gives value of capital stock in Kentucky	100,097,375
Equalized at 80%	80,077,900
Less tangible property in Kentucky	28,806,072
Value of Franchise in Kentucky	$51,271,818
816 Net income of the L. & N. R. R. less rents and dividends	$17,159,550
Deduct rents and dividends	1,307,067
Capitalized at 6% *per cent* gives total value of capital stock of L. & N.	264,208,050
Apportioned to Kentucky on mileage basis, 35%, gives value of capital stock in Kentucky	92,472,817
Less assessed value of tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$45,172,182
Total value of capital stock	$264,208,050
Apportion to Kentucky on gross income basis gives value of capital stock in Ky	100,398,059
Equalized at 80% value of capital stock in Kentucky equalized	80,318,447
Deduct assessed value of tangible property	28,806,072
Value of franchise in Kentucky	$51,512,375

Valuation No. 3.

Value of capital stock of the L. & N. R. R. ascertained by capitalizing net income deductions	$264,208,000
Total value of capital stock of roads which the L. & N. R. R. Co. owns share of stock	110,000,000
Total assets of all roads	$374,208,000
Apportioned to Kentucky on the basis of mileage owned, operated, leased or controlled, 25%, the value of capital stock in Kentucky	93,552,000
Equalized at 80% gives value of capital stock in Kentucky equalized	74,841,600
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$46,035,528

817 Valuation No. 4.

The report of respondent to the Railroad Commission of Kentucky shows the net operating revenue in Kentucky solely from operation of its road in Kentucky to be	$7,068,062
Deduct taxes paid in Kentucky	718,620
Net operating revenue of company in Kentucky	6,349,442
Capitalized at 6% shows value of property in Kentucky	100,824,000
Equalized at 80% shows value of property in Kentucky equalized	84,659,200
Deduct assessed value of tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$45,853,128

NOTE.—The Statute does not mention this method of ascertaining the value of that portion of the capital stock of a corporation doing an interstate business in Kentucky, but this computation has an evidential bearing on the value of that portion of respondent's property in the State of Kentucky. It shows its value as an income producing unit.

Valuation No. 5.

Valuation in Conformity With Judge Cochran's Opinion.

Value of operative property of L. & N. Railroad Company within and without Kentucky ascertained by capi-alizing net operating income derived by L. & N. Railroad Company wholly from its operative mileage.

Operating revenue of L. & N. Railroad Company as shown by Interstate Commerce Commission	$14,882,672
Capitalized at 6%	248,044,500
Tangible value of operative mileage, road and equipment (see protest of report)	178,927,902
Intangible value of operative road and equipment	69,116,598
35% Kentucky's share of value of tangible property on operative mileage basis	62,523,665
Kentucky's shares of intangible value of road and equipment on gross earnings basis 38%	26,264,297
Value of Kentucky's share of the operative mileage of property of the L. & N. Railroad Company	88,787,962

In addition to the operative mileage and equipment thereof the L. & N. Railroad Company owns and has the following personal property, all of which is taxable and must be considered by the Board in fixing the value of its franchise subject to taxation. (See Cumberland Telegraph & Telephone Company, 30 Ky.) This char-

acter of personal property—Bonds par value—$13,065,408—
818 Ledger value—$12,538,049—Stocks in foreign corporations that do not pay taxes in Kentucky. The Board has not ascertained this value.

Advances to property, affiliated and controlled companies for construction and betterment (See balance sheet of Company)	7,992,897
Temporary advances to proprietary affiliated and controlled companies (See balance sheet)	6,335,897
Special deposits	862,135
Total value of personal property	$27,728,326

The Illinois Central Ry. Comapny and the C. & O. Railroad Company and the C., N. O. & T. P. Ry. Company contend and claim this character of personal property should not be considered in fixing the value of their franchise in Kentucky, because the situs of taxation for same is at the domicil of the corporation. The L. & N. Railroad Company claimed before the Alabama Railroad Commission that the situs of taxation of this character or kind of its property was at the domicil of the corporation, Louisville, Kentucky. Out of abundance of caution, and to be conservative, we will apportion this property to Kentucky on the operative mileage basis, 35%.... 9,704,914

Recapitulation.

Kentucky's proportion of tangible property	62,523,665
Kentucky's proportion of intangible value of road and equipment	26,264,297
Kentucky's proportion of personal property	9,704,914
Total of all taxable property of L. & N. Railroad Company in Kentucky	98,492,876

Valuation No. 6.

Net earnings of the L. & N. Railroad Company as shown by report to stockholders for the year ending June 30, 1912, is	17,159,550
Capitalized at 6%	285,992,500
Deduct value of non-taxable stocks owned by the L. & N. R. R. Company in corporations separately taxed	30,761,799
Total value of capital stock of L. & N. R. R. Company, excluding as non-taxable investments	255,214,000

Apportioned to Kentucky on mileage basis, 35%, gives value of capital stock in Kentucky	89,324,900
Equalized at 80%	71,459,920
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$42,653,848

819 Value of capital stock in Kentucky ascertained as above stated $285,992,500

Apportioned to Kentucky on gross income basis gives value of capital stock in Kentucky	96,981,320
Equalized at 80%	77,585,056
Less tangible property in Kentucky	28,806,072
Value of franchise in Kentucky	$48,778,984

(q) This information was given in answer to interrogatory next preceding.

(r) The Board in addition to the report of the Company to the Auditor as of June 30, 1912, also considered the Statutory Report of the company to the Railroad Commission made as of June 30, 1912, in respect to the net and gross earnings of the Company within and without Kentucky, and the ratio thereof in Kentucky. The amount of taxes paid in Kentucky, and the nature and value of the Company's investments in the securities of other companies, its operative income and expenses in Kentucky and the ratio thereof. The Board also considered a publication designated as a preliminary abstract of Statistics of Common Carriers, issued by the Interstate Commerce Commission as of June 30, 1912, in reference to the gross and net income of Railway Companies and other information. The Board also considered the bill filed by respondent in 1906 in the United States Court for the Eastern District of Kentucky against Siler et al., which bill was sworn to by Mr. Milton H. Smith, then and now president of the respondent. This bill among other things stated the mileage of respondent within and without Kentucky as of June 30, 1905, the gross and net income within and without Kentucky as of same date, the cost of reproduction of that portion of respondent's road and equipment in Kentucky as of that date.

We also considered the finding as to the number of miles of road in the L. & — system, the condition of the road in Alabama and its earning capacity as found and set out in the opinion of Judge Jones, 196 Federal, page 800.

The Board requests you to furnish to it a copy of the report made by respondent to the Interstate Commerce Commission as of June 30, 1912.

All of the foregoing calculations were made for the purpose of aiding the Board to arrive at the fair cash value of that portion of plaintiff's property or capital stock in Kentucky. This we have not finally determined. We understand and construe the statute of this State relating to the assessment of the corporate franchise of cor-

porations subject to taxation therein, to require the Board when arriving at or fixing the value of the franchise of a corporation for taxation to first ascertain the fair cash value of the assets or capital stock of the corporation under consideration; next it must apportion to this State the proportion thereof which the miles within the State bear to the total mileage within and without the State.

820 If the evidence warrants the belief that all miles of the road under consideration are equal in value, or that part in Kentucky is of the average value, then that proportion of the entire value of the capital stock which the mileage in Kentucky bears to the mileage within and without Kentucky will be the value of the capital stock of the corporation in Kentucky, from which sum must be deducted the assessed value of the tangible property in Kentucky, the remainder thus found being the value of the corporate franchise subject to taxation in the State. If that proportion or part of the road in Kentucky is not as valuable, or is more valuable, as the case may be, then the remainder of the property of the corporation, then an apportionment of the entire value of the capital stock of the corporation on the mileage basis is an improper way to ascertain the value of the portion of the capital stock in Kentucky.

In other words, an apportionment of value on the mileage basis in all cases may not be correct. The proportion or part of the property of the corporation under consideration in the State is and can be exactly ascertained by using the mileage basis of apportionment, but its relative value to the remainder or that proportion out of the State will and does depend on other facts, for instance, the cost of reproduction new, less depreciation and its earning capacity. The value of the entire property and of that part or proportion within this State is a question of fact to be determined from all the evidence before the Board. The Board requests you to offer evidence of the value of your entire property, and evidence of the value of that part or portion thereof in Kentucky. Our finding as to the value of your capital stock and that proportion there in Kentucky when making a final assessment will be governed by the proof.

The foregoing answers to your interrogatories and statements therein, in connection with our statement heretofore given you on October 23, 1913, embrace as nearly as we can state to you our opinion as to how the value of your franchise in Kentucky subject to taxation should be ascertained. If these views conflict with those entertained by your representatives, we ask your representatives to point out wherein our views are erroneous, and in addition thereto to submit to us what, in your opinion, is the correct method of ascertaining the value of your taxable franchise in Kentucky.

We request you to submit for our consideration calculations showing the value of your franchise, based upon and made in conformity to the opinion of Judge Cochran recently rendered in the case of L. & N. Railroad Company vs. Bosworth, et al. in the United States District Court for the Eastern District of Kentucky as we

will endeavor to conform to that opinion in making the final assessment of your franchise for this year.

H. M. BOSWORTH, *Auditor.*
C. F. CRECELIUS,
Secretary of State.
THOS. S. RHEA,
Treasurer State of Ky.

821 Thereupon, towit, on November 17th, 1913, the complainant proceeded with its hearing which was continued from day to day until completed. The Complainant during the hearing filed as part of its evidence several affidavits of citizens from various counties in this State whereby it was sought to be shown by complainant that the Land Assessors of the State had systematically, habitually, intentionally and designedly assessed and have assessed the property of individuals and corporations not required — report to said State Board of Valuation and Assessment at less than its fair cash value estimated at the price it would bring at a voluntary sale.

At the conclusion of the hearing of the evidence of complainant the Board of Valuation and Assessment requested the Attorney General of the State of Kentucky, the legal adviser of said Board, to render to them an opinion as to the relevancy, materiality and competency of such testimony. Whereupon, the Attorney General rendered an opinion to said Board which was made a part of the record and is in words and figures as follows, towit:

Before the attorneys for complainant begin the argument, I desire to call the Board's attention to the affidavits filed by Col. Stone for the purpose, as he claims, of showing that local assessors systematically, habitually and intentionally assessed the lands, town lots and other property at not exceeding 60 per cent of their real value.

Affidavits from twenty-three counties were filed. The counties of Green and Taylor are included in this list. The fact that neither Green nor Taylor has a sheriff or any one authorized to collect the taxes for county purposes for said counties, together with the further fact that judgments in large sums have been rendered against the counties, and that the fiscal court has been required by mandamus to levy a large tax for the purpose of paying these judgments, is sufficient evidence to show that neither of these counties should be considered for the purpose for which the affidavits were filed.

822 In support of this claim I attach hereto and make part hereof affidavit from J. W. Cloyd, ex-County Judge, Henry R. Turner, cashier of the Bank of Campbellsville, T. W. Buchanan, merchant, W. I. Meter, Clerk of the Taylor Circuit Court, G. D. Smith, and J. R. Sanders, County Attorney, all of whom are leading and well informed citizens of Taylor County.

Also the affidavits of Elliot Graham, County Judge, J. McV. Shreve, Circuit Clerk, W. H. Milby, County Attorney, L. E. McGinnis, Collector of State Taxes, all of whom are leading and well informed citizens of Green County.

When you have eliminated the two counties referred to, the twenty-one remaining counties are Bell, Carroll, Christian, Clark,

Hart, Henderson, Henry, Hopkins, Laurel, Lee, Marion, Ohio, Perry, Powell, Shelby, Simpson, Todd, Union, Warren, Webster, Whitley. The assessment as reported by the assessors from each of these counties, which has been equalized and supervised, amounts in the aggregate to the sum of $133,225,118, while the total assessment from all the counties in the State of Kentucky amounts to the sum of $852,171,205.

I am of the opinion that these affidavits do not demonstrate that the assessors of the twenty-one counties have either systematically, habitually or intentionally assessed the property at not exceeding 60 per cent. of its real value, but if they should so demonstrate, this Board has no power over said officials, and has no way to cure the evil complained of.

Section 182 of the Constitution authorized the General Assembly to provide for the assessment of railroad and railway property, and the collection of taxes thereon in a manner different from that provided for the assessment and collection of the tax on other property.

In the case of the Louisville Railway Company v. Commonwealth, 105 Kentucky 710, the Court of Appeals in passing upon a question similar to the one attempted to be raised by complainants, said:

"The contention of counsel for appellant is to the effect that if other officers of the State disregard the constitutional provisions and the Statutes requiring them to assess property at its fair cash value, the court should adjudge that the action of the Board of
823 Valuation and Assessment in assessing franchise- at their fair cash value estimated at the price they would bring at a fair voluntary sale, should be set aside. It is certainly an unusual demand that the action of officers should be disregarded, although they may have acted in strict conformity to the law imposing the duty. The officers take an oath that they will faithfully discharge their duties, and if they have due respect for their oaths, they are bound to follow the requirements of the organic and statutory laws of the State. There never can be exact equality and uniformity in taxation. The purpose of the constitutional provision in question was to require all property to be assessed at its fair cash value. There is no way to execute that provision of the Constitution except officers be selected by the people for the purpose of assessing the property that revenues may be raised to carry on the government. It does not seem to be logical or sound in principle to say that because one officer, or a class of officers, disregard the law, the action of those who strictly follow it, for that reason, should be annulled."

In the case of Bolls Gap Railroad Company v. Commonwealth of Pennsylvania, 134 U. S. 239, the Supreme Court said:

"The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose a different specific tax upon different

trades and professions and may vary the rate of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only and not tax securities for the payment of money. It may allow deductions for indebtedness, or not allow them."

Again, the State Railroad Tax Cases, 92 U. S. 575, the Supreme Court of the United States said:

"Perfect equality and perfect uniformity of taxation, as regards individuals or corporations, or the different class of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgment and opinion must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfections of human nature and of the evidence on which human judgment is founded."

824 The Court of Appeals of Kentucky and the Supreme Court of the United States have both said that the manner of assessing property by the assessor is not to control other assessing bodies when fixing the valuation upon the tangible and intangible property of railroad companies.

Section 171 of the Constitution of Kentucky requires that taxes shall be uniform upon all property subject to taxation within the territorial limit of the authority levying the tax, while section 172 requires that all property not exempt from taxation shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. Then, having your oaths, and the mandates of your Constitution as considered by the highest court of your State and approved by the Supreme Court of the United States, it is your duty to assess for taxation, at its fair cash value, and to see that the taxes are uniform upon all the property which you are authorized to assess for taxation.

For the purpose of demonstrating that the claim of complainant is not founded upon fact, I file with the Board for its consideration, affidavits of the Sheriff and County Judge of Adair County; the affidavits of the County Clerk, Sheriff and Assessor of Boone County; the affidavits of the Assessor, the County Clerk and a real estate agent of Boyle County; the affidavit of the Sheriff and Assessor of Fayette County; the affidavit of the Clerk of Kenton County; the affidavit of the County Judge, the Deputy County Clerk, the Sheriff, the Assessor and the Chairman of the County Board of Equalization of Jefferson County, and the affidavits of the County Clerk, the County Judge, the Sheriff and the Assessor of Lincoln; the affidavits of the Deputy Assessor, the County Judge, the Clerk and the Sheriff of Nelson County. The affiants state facts showing that they have a knowledge of the values in the respective counties, and

that they are acquainted with the assessed value of the property in their respective counties, and that the property of their re-
825 spective counties is assessed for taxation at 80 per cent of its fair cash or real value.

The Counties of Adair, Boone, Fayette, Kenton, Nelson, Lincoln, Boyle and Jefferson report an assessment which aggregates $308,069,386. These affidavits demonstrate that more than one-third of the total assessed value of Kentucky is assessed at least 80 per cent of the real value.

In the light of the information furnished you by these affidavits, you should be convinced that the property in the State of Kentucky assessed by the assessors, supervised and equalized by the county board and by the State board, is assessed at at least 80 per cent of its real value, which was the per cent used by this board in fixing the valuation upon the capital stock of banks and trust companies.

(Signed) JAMES GARNETT,
Attorney General.

The affiant says that the members of the Board of Valuation and Assessment after hearing the evidence and arguments of counsel diligently and thoroughly considered same.

That on the 29th day of December, 1913, the Board of Valuation and Assessment met pursuant to the call of the Chairman of said Board for the purpose of assessing the corporate franchise of complainant for taxation for year 1913, at which time said Board made the following finding as to the facts and fixed the value of complainant's franchise. Said finding is in words and figures as follows; towit:

826 *The Finding and Order of the Board of Valuation and Assessment Assessing the Franchise of Complainant.*

The Board of Valuation and Assessment met on November 17, 1913, in the State Capitol, for the purpose of considering the protest filed by the Louisville & Nashville Railroad Company, and for the purpose of hearing this Company's complainant against the tentative assessment of its franchise for taxation for the year 1913, and there were present as members of said Board H. M. Bosworth, Auditor of Public Accounts, Thomas S. Rhea, Treasurer, and C. F. Crecelius, Secretary of State, and the following proceedings were had:

On motion it was ordered that James Garnett, Attorney General, be requested to attend said Board at its meetings and advise with it in its proceedings. Thereupon, came Colonel Henry L. Stone, W. A. Colston, and Mr. Robert E. Fleming, attorneys for the Louisville & Nashville Railroad Company, and presented their written complaint and objections to the tentative assessment of said corporation, to which were attached several questions propounded to said Board by said attorneys representing said corporation, which complaint was ordered filed, and in order that said Board might

prepare a written answer to the questions so propounded, by agreement of parties the hearing was continued until November 20th, and on November 20th, the Board met pursuant to adjournment, when it presented to the counsel for the Louisville & Nashville Railroad Company the answers to the questions which had been propounded to the Board, which answers were filed, and thereupon, complainant produced its witnesses and evidence, stenographic notes of which were at the time made by a stenographer furnished by said corporation, and a transcript of the evidence was made and furnished to the Board and filed and made a part of its records. Not being able to complete the taking of evidence, the hearing was by agreement adjourned from time to time, as shown by the
827 transcript, until said hearing was completed, and the Board then continued said meeting from day to day until the 23rd day of December, 1913, when it made and adopted the following findings:

In ascertaining the value of the corporate franchise of a railroad company operating lines of railway in Kentucky and elsewhere, the Board of Valuation and Assessment conceives it to be its duty to first ascertain the fair cash value of the capital stock of all the assets of the corporation under consideration, and then to ascertain the proportion thereof which the mileage of said company in this State bears to the mileage within and without the State, which proportion the Board should consider in fixing the value of the corporate franchise, and from the value of that proportion of the capital stock in Kentucky should be deducted the assessed value of all tangible property assessed in this State or counties where situated. The remainder thus found will be the value of the corporate franchise.

The Board is of the opinion, and believes the fair cash value of the capital stock of a railroad company can be more accurately ascertained in most instances by capitalizing the net income of the corporation. In order to employ this method, the Board must first ascertain the net income of the corporation under consideration. To ascertain the net income of respondent, the Board considered the report made by it to the Auditor as of June 30, 1912, its annual report to stockholders, and to the Kentucky Railroad Commission and the Interstate Commerce Commission, and the testimony of George W. Lamb given before the Board at the hearing on the tentative assessment. (See Exhibit #2.)

The Net Earnings of the L. & N. R. R. Co.

The total income of the L. & N. R. R. Co. for the year ending June 30, 1912, as shown by testimony of G. W. Lamb (See exhibit #2) is..... $16,201,150

The total net income of the L. & N. R. R. Co. for the year ending June 30, 1912, as shown by report of that company to Auditor is..... 15,882,188

The total net income of L. & N. R. R. Co. as shown by report to Kentucky Railroad Commission, which is the same as made by the company to the Interstate Commerce Commission (see testimony — George W. Lamb) is		18,052,905
828 This includes income of roads operated for account of owners whose earnings are not available to the L. & N. R. R. Co. towit:		
South & North Alabama	$1,401,708	
Glasgow Railroad Co.	31,847	
Elkton & Guthrie R. R. Co.	6,049	
Total	$1,439,604	
Deduct		$1,439,604
Total income of L. & N. R. R. Co. available for corporate purposes		16,613,301

It will observed from the foreging that the several reports of respondent as to its net income do not agree. Therefore, the Board must determine the true amount of the net income of respondent from evidence before it, and the opinion of the Board is that the return of respondent to the Kentucky Railroad Commission and the Interstate Commerce Commission correctly states its net income available for corporate purpose for the year ending June 30, 1912.

These reports state the net income of respondent to be	$18,052,905
From which deduct net earnings of roads operated for account of owners (see report to Ky. Railroad Commission, page 39)	1,439,604
Total net income of L. & N. R. R. Co. available for corporate purposes	$16,613,301

It is insisted by respondent that if the capitalization of net earnings plan is to be used for the purpose of ascertaining the value of the capital stock of respondent, the average net earnings of respondent for a period of at least five years should be used to ascertain a fair result; that the consideration of the net earnings of respondent for any one year does not accurately show the real value of its assets. This theory is not applicable to this case, for the reason that the mileage of the company has increased from year to year for the last ten years. The average operated mileage of the company for the years 1902 and 1903 was 3,438.93; for the years 1911 and 1912 4,709.93 (see report to stockholders.) In the last five years the company acquired 362 miles. The mileage in Kentucky in 1907 was 1232.82 miles, and in 1911 it was 1487.4, and in 1912 it was 1574 miles. (See bill of L. & N. R. R. Co. v. Bosworth, page 51. See report to stockholders. See Exhibit #28 G. W. Lamb.)

If the mileage of the company within and without the
829 State had been the same during the last five years, the claim of respondent that the average net earnings for the last five years should be considered would be more tenable. It is insisted that the net income of the company should not be capitalized at so low a rate as 6 per cent, because investors in railroad property are entitled to earn more than 6 per cent on their investment, and the legal rate of interest in other States through which the L. & N. Railroad operates its lines is higher than 6 per cent, but we find no merit in this contention.

The Deduction of the Value of Non-Taxable Property.

It is claimed by respondent that the Board should, if it ascertains the total value of the capital stock of respondent by capitalization of net income, deduct from total net income so much thereof as accrues from its investments in securities non-taxable in Kentucky, and so much thereof as arises from rents received for lines owned in fee but leased to and operated by other companies. The deductions claimed are set out in Note D on page 2 in report to Auditor, and on page 39 of the report to the Railroad Commission. We are in doubt as to the correctness of this claim as to the rent received by respondent for Paducah & Memphis Division and Clarksville & Princeton Branch, amounting to $218,545, but to be sure that no injustice is done, we will allow this deduction. The other deductions claimed are proper, with the exception of the item of $70,953 received from Lexington & Eastern Railway Company. This amount was paid to the L. & N. by the Lexington & Eastern Railway Company as interest on bonds, and must be considered in fixing the value of the franchise of the L. & N. R. R. Company. The deductions claimed will be allowed with this exception, and they amount to $878,147.

Mileage.

The Louisville & Nashville Railroad Company owns, oper-
830 ates, leases and controls 4478.61 miles of railroad in Kentucky and elsewhere. In addition to this it operates for account of owners 220.88 miles. Those lines operated by respondent for account of owners are owned by another company and are separately taxed. The income and revenue arising from those lines operated for account of owners is collected by respondent, but accounted for and paid over to the companies owning those lines. The respondent owns shares of stock in other railroad companies which operate their own property under *under* their own corporate management, and are separately taxed. The incomes and revenues of those companies in which respondent owns shares of stock is not the income and revenues of respondent and is not available to it for any purpose. The total mileage of those companies is 2937.89 miles, 286 or one-tenth of which are in

Kentucky, and 2651 or 90 per cent of which are outside of Kentucky. The respondent claims that in ascertaining the ratio of mileage, owned, operated, leased and controlled by it in Kentucky, to that owned, operated, leased and controlled within and without Kentucky, that the mileage of those companies in which it owns shares of stock should be considered, but that none of the assets of those roads should be considered when finding the value of the capital stock of respondent; that the ratio thus found should be applied to the capital stock of respondent to ascertain the mileage proportion thereof in Kentucky. We are of the opinion that if the mileage of those companies is to be considered in finding the mileage ratio of respondent in Kentucky for the purpose of ascertaining the mileage proportion of the capital stock in Kentucky, then the assets or capital stock of those companies must also be taken into account and considered in order to find the true mileage proportion of the value of capital stock of respondent in Kentucky on the mileage basis.

If respondent had invested in the shares of an industrial corporation instead of investing in the shares of railway companies, the mileage ratio of respondent's road in Kentucky would undoubtedly be 35.15. If the respondent should divest itself of the owner-
831 ship of the shares it owns in other railway companies operated under separate management and separately taxed, then unquestionably the ratio of mileage in Kentucky to that within and without Kentucky would be 35.15.

We also are of the opinion that in order to ascertain the proportion of the capital stock of the respondent in Kentucky on the mileage basis, those miles of road owned, operated, leased and controlled by respondent within and without Kentucky whose income and revenue accrue to the L. & N. R. R. Co., and which are available to it for its corporate use and purposes, should be considered. We find upon consideration thereof that the miles of road owned, operated, leased and controlled by respondent in Kentucky and elsewhere whose income and revenues are available to and belong to the L. & N. Railroad Company, and are applicable for all purposes of that company, none of which lines are separately operated or separately taxed, embrace and consist of 4478.61 miles in Kentucky and elsewhere, 1574.47 miles of which are in Kentucky, and the remainder, 2904.14, are outside of Kentucky, and the ratio of mileage of respondent in Kentucky on this basis to that in Kentucky and elsewhere, is 35.15 per cent. The said mileage does not embrace or include those lines operated for account of owners by respondent, which lines are separately taxed, and the revenues from which are not available to nor do they belong to respondent; nor does it embrace or include any mileage of those lines of road in which this company owns shares of stock.

We find respondent owns shares of stock in seven other railway companies, which companies operate and own their own lines of railway and are separately taxed, and the income and revenues arising from the operation of said lines do not belong to and are not available to respondent. Said roads are as follows: (See report to stockholders, page 5.)

Nashville, Chattanooga & St. Louis Ry.
(A majority of the capital stock owned.)
832 Central Transfer Railway & Storage Co., Louisville.
(One-half of the capital stock owned.)
Chicago, Indian-polis & Louisville Ry.
(A majority of the capital stock owned jointly with the Southern Ry.)
Louisville, Henderson & St. Louis Ry. less mileage of L. & N. R. R. operated under trackage arrangement.
(A majority of the capital stock owned.)
Woodstock & Blocton Ry.
(One-half capital stock owned.)
Lexington & Eastern Ry.
(All capital stock owned.)
New Orleans, Mobile & Chicago R. R.
(A majority of the capital stock owned jointly with the St. Louis & San Francisco R. R. Co.)

We find that respondent does not control said lines and only owns a majority of the shares of stock in three of said companies, towit: Nashville, Chattanooga & St. Louis Railway; Louisville, Henderson & St. Louis Railway, and Lexington & Eastern Railway; that the respondent in its protest admits that it does not have access to or control over the accounts of said companies and does not know the value of their assets and property. Considering the aforesaid 2,937.89 miles of road operated and separately taxed as mileage of respondent, the ratio of mileage in Kentucky of respondent to the mileage within and without Kentucky is 24.6. We are of the opinion, and find the mileage proportion of the capital stock of the Louisville & Nashville Railroad in Kentucky may be ascertained by finding 35.15 per cent of the total assets of the L. & N. R. R. or by finding 24.6 per cent of the total assets of the L. & N. R. R. Company, and those companies in which it owns shares of stock the lines of which are operated by their owners and are separately taxed. We find from the evidence that the lines held in the name of the Madisonville, Hartford & Eastern, the Wasioto & Black Mountain and the Morganfield & Atlanta are not operated by those companies and are not separately taxed; that those lines are embraced in and are an integral part of the L. & N. R. R. Company, and the revenues
833 arising from the operation of said lines belong to respondent, and were included in its report of earnings.

Other Facts to be Considered in Finding the Value of Corporate Franchise Subject to Taxation.

In fixing the value of the corporate franchise of a railroad company, the Board must consider that proportion of the capital stock thereof which the mileage in the State bears to the mileage within and without the State, the gross and net income within and without the State, the surplus fund and undivided profits, if any, and the Board may consider any other evidence that will aid in determining the true value of the capital stock of such corporation.

We find from the evidence that the gross revenue of respondent for the year ending June 30, 1912, derived in Kentucky is:

Intrastate	$6,123,626⅜
Interstate	15,330,029
Total	$21,453,655

(See page 45 of the report to Kentucky Railroad Commission.) We find the total gross revenue of the L. & N. Railroad for the fiscal year ending June 30, 1912, to be $56,311,788. The ratio of gross earnings of respondent in Kentucky to total gross earnings is 38 plus per cent. We find from the evidence that the net earnings of respondent in Kentucky for the year ending June 30, 1912, are $6,514,442; that the total net earnings for the whole system for the year are $16,623,976; that the ratio of net earnings in Kentucky to entire net earnings is 39 plus. We find the net operating revenue per mile of respondent on its entire line is $3,521 per mile (see report to stockholders, page 93 Kentucky Railroad Commission.) We find the net operating revenues per mile of road of respondent on its lines in Kentucky is $4,373 per mile. (See report to Kentucky Railroad Commission, page 93*a*); that the net operating revenue per mile of respondent in Kentucky is $752 more than the average earn-
834 ings per mile of its entire line. The percentage of expense to operating revenue of entire line is 70.49 (see report to stockholders, page 7; report to Railroad Commission, page 65); that the percentage of expense in Kentucky to operating revenues of entire line is 67.05 (see report to Kentucky Railroad Commission, page 65).

We find the cost of reproduction of road and equipment in Kentucky as of June 30, 1905, was $70,599,484. The total mileage in Kentucky June 30, 1905, was 1,234 miles (see bill of L. & N. R. R. v. Siler, U. S. District Court.) We find the cost of reproduction of road and equipment in Kentucky on June 30, 1912, was $85,983,034. The total mileage in Kentucky June 30, 1912, was 1,574 miles (see testimony and exhibit # 28 George W. Lamb). The total increase in mileage in Kentucky from June 30, 1905, to June 30, 1912, was 340 miles. The respondent claims a charge for depreciation on its road in Kentucky since June 30, 1907, amounting to $3,542,106. The depreciation charged by respondent to all its lines in Kentucky and elsewhere since June 30, 1907, is $4,323,621. According to this statement the road of respondent in Kentucky, which is 35.15 per cent of its total, has depreciated in value $3,542,106 in the last five years, while the remainder of its road, 65 per cent of the whole, has depreciated in value only $781,515 (for charge of depreciation of road since June 30, 1907, see report to stockholders, page 20).

Valuations.

To enable the Board to determine the total value of the capital stock of respondent in Kentucky and elsewhere, and the mileage pro-

portion thereof in Kentucky, the Board considered and used the following computations in connection with the evidence introduced by respondent:

Net earnings of L. & N. R. R.		$18,052,905
Deduct net earnings of North & South Alabama	$1,401,708	
Glasgow R. R. Co.	31,847	
Elkton & Guthrie R. R.	6,049	1,439,604
Balance		$16,613,301
835		
Deduct income from non-taxable securities (See report to Railroad Commission, page 39) (See report to Auditor)		$878,147
Balance		$15,735,154
Total value of capital stock of L. & N. R. R. arrived at by capitalizing net income at 6 per cent		$262,252,566
Kentucky's proportion of the capital stock on mileage basis of 35.15 per cent		92,181,776
80 per cent, Kentucky's proportion of the capital stock		73,745,421
Deduct assessed value of tangible property in Kentucky		29,500,772
Value of franchise on this basis		$44,244,649
Kentucky's proportion on gross earning basis, 38 plus per cent		99,655,975
80 per cent of Kentucky's proportion		79,724,780
Deduct assessed value of tangible property in Kentucky		29,500,772
Value of franchise		$50,244,008

The total value of the mileage proportion of the capital stock of the L. & N. R. R. Company in Kentucky arrived at by considering mileage and assets of the L. & N. R. R. Company and mileage and assets of those roads in which it owns shares of stock, arrived at by capitalizing net income at 6 per cent., is as follows:

Total value of capital stock of the L. & N. R. R. Co.	$262,252,566
Of the New Orleans, Mobile & Chicago	9,661,300
Chicago, Indianapolis & St. Louis	27,496,900
Louisville, Henderson & St. Louis	4,390,800
Nashville, Chattanooga & St. Louis	49,191,600
North & South Alabama	25,269,600
Georgia Railroad Co.	14,596,900
Lexington & Eastern	3,198,200
Total	396,057,866

Kentucky's proportion on mileage basis, 24.6	96,430,245
80 per cent of Kentucky's proportion	77,944,196
Less assessed value of tangible property in Ky	29,500,772
Value of franchise	$48,443,424

The report of the L. & N. Railroad Company shows the net rail operating revenue of the company to be $13,190,947. This
836 does not include income from any other source. Capitalizing this sum at 6 per cent gives value of road and equipment as a carrier of freight $219,849,116.

Kentucky's proportion of value of road and equipment on mileage basis, 35.15		$77,276,964
Add total value of intangible property, stocks, bonds, moneys and credits, towit:		
Bonds	$12,538,049	
Stock in foreign corporations taxable in Kentucky	4,219,491	
Loaned to proprietary companies for construction and equipment	7,992,897	
Advanced to affiliated companies	6,294,540	
Special deposit	862,135	
Total		31,907,112
Total value of property in Kentucky		109,795,952
80 per cent of value of property in Kentucky		87,347,260
Less assessed value of tangible property in Kentucky		29,500,772
Value of franchise		$57,846,498

In arriving at the basis for estimate of value of the capital stock or property of respondent, the Board has considered the cost of construction of road and equipment and cost of reproduction thereof, the real value of its stocks and bonds and the gross and net earnings thereof within and without Kentucky, and all other matters appertaining thereto as shown by the proof, that would assist the Board in arriving at the fair cash value thereof, and upon consideration of all the foregoing and after hearing the argument of counsel for respondent, and after having taken time to thoroughly consider all matters brought out in the hearing, it is now adjudged and determined by the Board of Valuation and Assessment of Kentucky that the fair cash value of the total capital stock of the L. & N. R. R. Co. is $262,252,566

That the proportion of the capital stock in Kentucky on the mileage basis 35.15 is	92,181,776

But the Board found that the excess value in Kentucky over this sum as shown by the proportion

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of the capital stock in Kentucky on the gross income basis is	$7,472,199
And that the excess value found in Kentucky by using the net income ratio is	10,096,624

Following the plan suggested by Judge Cochran in his opinion recently handed down in the case of L. & N. Railroad Company v. Bosworth on hearing for a preliminary injunction, we ascertained the excess value as follows:

The entire value of the tangible property of the L. & N. R. R. Co. within and without Kentucky as shown by the report to the Auditor is	$177,038,113
The total value of the capital stock as found by the Board is	262,252,566
From which deduct	177,038,113
And the value of the intangible property of the L. & N. R. R. within and without Kentucky is found to be	85,214,453
The mileage proportion of the tangible property, 35.15	62,228,896
The gross income proportion of the intangible property, 38	32,421,492
Value of capital stock in Kentucky	94,650,388

Therefore, the Board of Valuation and Assessment places the excess value in Kentucky over the value found on the mileage basis at $2,318,224, and fixes and determines the value of Kentucky's proportion of the entire capital stock of the respondent at $94,500,000, but to be conservative, and out of an abundance of caution to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this State, the Board has considered less than 80 per cent of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent, and it is now ordered that the value of the capital stock of the L. & N. Railroad Company in Kentucky for the year 1913 be fixed at $75,159,402, which, in the opinion of the Board, is less than 80 per cent of its fair cash value, and from this sum there is deducted the assessed value of the tangible property, towit: $29,500,772, and the remainder, towit: $45,658,630, is adjudged to be the value of the franchise of the L. & N. Railroad Company
838 in Kentucky subject to taxation for the year 1913.

Upon the question of adopting the foregoing order:

Bosworth voted yes.

Rhea voted yes.

Crecelius voted yes.

The Secretary of the Board is directed to notify the L. & N. R. R. Co., of the adoption of the foregoing order and furnish it with a copy thereof.

BOSWORTH, *Chairman.*
H. M. BOSWORTH.

Subscribed and sworn to before me in Frankfort, Franklin County, Kentucky, on this 5th day of February, 1914.

D. O. MYATT,
Notary Public for Franklin Co., Ky.

My Commission expires March 4, 1916.

839 Defendants also read as depositions (under stipulation) the following affidavits of C. F. Crecelius, Thomas S. Rhea and Henry M. Bosworth:

"United States District Court for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
vs.
HENRY M. BOSWORTH et al., Defendants.

Affidavit for Defendants.

The affiant C. F. Crecelius, a member of the Board of Valuation and Assessment of the State of Kentucky, says it is untrue that said Board, for the year of 1913, assessed the property of other corporations required to report to said Board, at less than the fair cash value of said property of other corporations estimated at the price it would bring at a fair, voluntary sale, and at not more than 60% of the fair, cash value of said property estimated at the price it would bring at a fair, voluntary sale, and not more than 60% of the real or true value of such property.

The affiant says it is untrue that the said Board assessed the value of plaintiff's property at far more than the cash value of said property, estimated at the price it would bring at a fair, voluntary sale, and at largely more than the real value of such property. Affiant states that said Board, in assessing the property of all corporations required to report to said Board, used the same general rule or method in ascertaining the value thereof, and said Board made and fixed the assessments thereon uniformly and without any discrimination in favor of any one of the said corporations so assessed.

C. F. CRECELIUS.

STATE OF KENTUCKY,
Franklin County, ss:

This day personally appeared before me, C. F. Crecelius a member of the State Board of Valuation and Assessment, and was duly sworn by me to the foregoing affidavit, which he states is true as he verily believes.

Given under my hand, this 6th day of February, 1914.

D. O. MYATT,
Notary Public, Franklin County, Kentucky.

My commission expires Mar. 4, 1916."

"United States District Court for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
vs.
HENRY M. BOSWORTH et al., Defendants.

Affidavit for Defendants.

The affiant, Thomas S. Shea, a member of the Board of
840 Valuation and Assessment of the State of Kentucky, says it is untrue that said Board for the year 1913, assessed the property of other corporations required to report to said Board, at less than the fair cash value of said property of other corporations estimated at the price it would bring at a fair, voluntary sale, and at not more than 60% of the fair, cash value of said property estimated at the price it would bring at a fair, voluntary sale, and not more than 60% of the real or true value of such property.

The affiant says it is untrue that the said Board assessed the value of plaintiff's property at far more than the cash value of said property, estimated at the price it would bring at a fair, voluntary sale, and at largely more than the real value of such property. Affiant states that said Board, in assessing the property of all corporations required to report to said Board, used the same general rule or method in ascertaining the value thereof, and said Board made and fixed the assessments thereon uniformly and without any discrimination in favor of any one of the said corporations so assessed.

THOMAS S. RHEA.

STATE OF KENTUCKY,
Franklin County, ss:

This day personally appeared before me, Thomas S. Rhea, a member of the State Board of Valuation and Assessment, and was duly sworn by me to the foregoing affidavit, which he states is true as he verily believes.

Given under my hand, this 6th day of February, 1914.

D. O. MYATT,
Notary Public, Franklin County, State of Kentucky.

My commission expires Mar. 4, 1916."

"United States District Court for the Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
vs.
HENRY M. BOSWORTH et al., Defendants.

Affidavit for Defendants.

The affiant, Henry M. Bosworth, Chairman and member of the Board of Valuation and Assessment of the State of Kentucky, says

it is untrue that said Board, for the year of 1913, assessed the property of other corporations required to report to said Board, at less than the fair cash value of said property of other corporations estimated at the price it would bring at a fair, voluntary sale, and at not more than 60% of the fair, cash value of said property estimated at the price it would bring at a fair voluntary sale, and not more than 60% of the real or true value of such property.

The affiant says it is untrue that the said Board assessed the value of plaintiff's property at far more than the cash value of said property, estimated at the price it would bring at a fair, voluntary sale, and at largely more than the real value of such property. Affiant states that said Board, in assessing the property of all corporations required to report to said Board, used the same general rule or method in ascertaining the value thereof, and without any discrimination in favor of any of the said corporations so assessed.

841 H. M. BOSWORTH.

STATE OF KENTUCKY,
Franklin County, ss:

This day personally appeared before me H. M. Bosworth, Chairman and member of the State Board of Valuation and Assessment, and was duly sworn by me to the foregoing affidavit, which he states is true as he verily believes.

Given under my hand this 6th day of February, 1914.

D. O. MYATT,
Notary Public, Franklin Co., State of Kentucky.

My commission expires Mar. 4, 1916."

Defendants read in evidence affidavits of the following ex-assessors: ,

Rufus Williams	ex-assessor Webster County.
W. J. Landrum	ex-assessor Breathitt County.
J. C. Pepples	ex-assessor Lincoln County.
H. F. Rodgers	ex-assessor Calloway County.
Noah B. Wooton	exassessor Leslie County.
J. A. Burres	ex-assessor Grayson County.
W. D. Curry	ex-assessor Green County.
C. C. McDonald	ex-assessor Knox County.
Boone Gosney	ex-assessor Campbell County.
T. G. Willis	ex-assessor Boone County.
W. T. Druen	ex-assessor Larue County.
Jno. A. Rice, Henry Thompson, W. E. Turner, J. F. Rice	ex-deputy assessors Bell County.
R. H. Miller	ex-assessor Bullitt County.
T. W. Payne	ex-assessor Carlisle County.
J. M. Padgett	ex-assessor Scott County.

W. H. C. Seale.....ex-assessor Lee County.
White Kemplin .....ex-assessor Morgan County.
L. M. Van Bibber..... ex-assessor Greenup County.
L. J. Harris .....ex-assessor Christian County.
Geo. E. Allen..... ex-assessor McCracken County.
Ben Jones ..... ex-assessor Bath County.
Kellie Beshears ..... ex-assessor Caldwell County.
T. C. Bradley .....ex-assessor Fayette County.
James Proctor .....ex-assessor Rockcastle County.
C. R. Marshall .....ex-assessor Pendleton County.
W. R. Calbert .....ex-assessor Trimble County.
J. M. Wolford ..... ex-assessor Adair County.
John Ingles ..... ex-assessor Harrison County.
G. O. Johnson .....ex-assessor Ballard County.
Geo. W. Nicholas .....ex-assessor Hickman County.
M. E. Lee ..... ex-assessor Hardin County.
Henry R. Childs ..... ex-assessor Mason County.
J. P. Mayfield ..... ex-assessor Pulaski County.
G. W. Brown .....ex-assessor Hancock County.
J. M. Sparks .....ex-assessor Robertson County.
Alex. Hamilton ..... ex-assessor Estill County.
842 Sheridan Gibbs ..... ex-assessor Johnson County.
B. W. Haynes .....ex-assessor Meade County.
W. G. McClintock .....ex-assessor Bourbon County.
Hubert Hinke ..... ex-assessor Nelson County.
Elijah Hart ..... ex-assessor Fleming County.
M. Abele ..... ex-assessor Kenton County.
T. H. White ..... ex-assessor McLean County.
Levi Oliver .....ex-assessor Lyon County.
Wiley S. Boyd .....ex-assessor Graves County.
A. J. Silcox .....ex-assessor Whitley County.
S. H. Byars .....ex-assessor Todd County.
S. I. Taylor ..... ex-assessor Madison County.
C. W. Ramsey .....ex-assessor Taylor County.
W. H. Bruner..... ex-assessor Laurel County.
W. P. Johnson ..... ex-assessor Shelby County.
Edward A. Barry .....ex-assessor Jefferson County.
Eugene Stark .....ex-assessor Simpson County.
W. S. Blankenship .....ex-assessor Boyd County.
J. R. Watkins .....ex-assessor Marshall County.
F. R. Grisson .....ex-assessor Monroe County.
L. D. B. Abele .....ex-assessor Union County.
W. S. Carrier .....ex-assessor Garrard County.
Robert H. Thomas .....ex-assessor Crittenden County.
Elize Voorhies .....ex-assessor Mercer County.
George Royalty .....ex-assessor Breckinridge County.
Woodson Mills .....ex-assessor Clay County.
L. G. Brown ..... ex-assessor Rowan County.
C. C. Mitchell .....ex-assessor Floyd County.
S. F. Raymer..... ex-assessor Edmonson County.
R. L. Mitchell .....ex-assessor Anderson County.

Geo. M. Adams ..... ex-assessor Letcher County.
J. W. Mills ..... ex-assessor Casey County.
W. P. Johnson ..... ex-assessor McCreary County.
H. L. Jones ..... ex-assessor Metcalfe County.
C. A. Blanford ..... ex-assessor Marion County.
Columbus Cooper ..... ex-assessor Lewis County.
G. A. Crabtree..... ex-assessor Powell County.
E. Cassity ..... ex-assessor Jessamine County.
843 D. G. Coffey ..... ex-assessor Russell County.
J. A. Lee ..... ex-assessor Butler County.
Eugene A. Wooten ..... ex-assessor Barren County.
Clabe Mosley ..... ex-assessor Knott County.
J. W. Wilkerson ..... ex-assessor Hart County.
J. R. Ryan, Jr. ..... ex-assessor Livingston County.
R. R. Hatfield ..... ex-assessor Pike County.
A. Jones ..... ex-assessor Owen County.
Charlie Rice ..... ex-assessor Lawrence County.
F. M. Price ..... ex-assessor Grant County.
William Ferguson ..... ex-assessor Gallatin County.
J. E. Robertson ..... ex-assessor Carroll County.
James Gray ..... ex-assessor Trigg County.
W. H. Myers ..... ex-assessor Warren County.
Harrison Lee ..... ex-assessor Franklin County.
N. M. Howard ..... ex-assessor Elliot County.
John Miller ..... ex-assessor Jackson County.
James Welch ..... ex-assessor Menifee County.
T. C. Noe ..... ex-assessor Harlan County.

844 each of which affidavits, except six, was in the following form, the blanks in every one being in each case filled in with the name of the affiant and the name of the county:

"STATE OF KENTUCKY,
County of ——, *set:*

The affiant, —— ——, says, that he was the duly elected, qualified and acting assessor of —— County, Kentucky, during the years 1910, 1911, 1912 and 1913; that in assessing property for taxation in said county for said years, affiant endeavored to follow the law and assess all property at its fair cash value estimated at the price it would bring at a fair voluntary sale, and if any property in said County was assessed at less than such fair cash value it was unintentional on the part of the officers in the County whose duty it was to assess property for taxation.

The affiant says that he never at any time entered into any agreement or understanding with any other officer in the state whose duty it was to assess property for taxation, or any one else, that property should be assessed at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and that he never heard of any such understanding or agreement; and further, he says that no property was ever intentionally assessed by him for

less than such fair cash value, and if he so assessed any property it was on account of mistake for lack of proper evidence as to its value.

—— ——.

Subscribed and sworn to before me by —— —— this — day of April, 1914.

—— ——."

The six affidavits that were not upon the exact form above given are as follows:

"STATE OF KENTUCKY,
County of Franklin, set:

The affiant, Geo. E. Allen, says that he was the duly elected, qualified and acting assessor of McCracken County, Kentucky, during the years 1910, 1911, 1912 and 1913; that in assessing property for taxation in said county for said years, affiant endeavored to follow the law and assess all property at its fair cash value estimated at the price it would bring at a fair voluntary sale, and if any property in said County was assessed at less than such fair cash value it was unintentional on the part of the officers in the County whose duty it was to assess property for taxation.

The affiant says that he never at any time entered into any agreement or understanding with any other officer in the state whose duty it was to assess property for taxation, or any one else, that property should be assessed at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and that he never heard of any such understanding or agreement; and further, he says that no property was ever intentionally assessed by him for less than such fair cash value, and if he so assessed any property
845 it was on account of mistake for lack of proper evidence as to its value, but affiant says that he tried to treat all parties fairly and equitably, and in some instances property was assessed at less than he thought was its fair cash value, but he let it stand because it was assessed in his opinion as other property in the same neighborhood.

GEO. E. ALLEN.

Subscribed ans sworn to before me by Geo. E. Allen this 28th day of April 1914.

D. O. MYATT."

"STATE OF KENTUCKY,
County of Boone, set:

The affiant Thos. G. Willis, says that he was the duly elected, qualified and acting assessor of Boone County, Kentucky, during the years 1910, 1911, 1912 and 1913; that in assessing property for taxation in said county for said years, affiant endeavored to follow the law and assess all property at 80% of its fair cash value estimated at the price it would bring at a fair voluntary sale, and

if any property in said county was assessed at less than 80% of its fair cash value it was unintentional on the part of the officers in the county whose duty it was to assess property for taxation.

The affiant says that he never at any time entered into any agreement or understanding with any other officer in the state whose duty it was to assess property for taxation, or any one else, that property should be assessed at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and that he never heard of any such understanding or agreement; and further, he says that no property was ever intentionally assessed by him for less than 80% of its fair cash value, and if he so assessed any property it was on account of mistake for lack of proper evidence as to its value.

(Signed) THOS. G. WILLIS.

Subscribed and sworn to before me by Thos. G. Willis this 22nd day of April, 1914.

(Signed) W. E. RIDDELL,
[SEAL.] *Notary, Public, Boone County.*

"Affiant, W. E. Turner, states that as deputy assessor of Bell County, Kentucky, he made the assessment for the 3rd and 4th magisterial districts of Bell County, Kentucky, for the year 1912, and of the 7th magisterial district of Bell County, Kentucky, for the year 1913; that in assessing the property in said districts for taxation for said years, this affiant endeavored to follow the law, and assess all property at its fair cash value, estimated at the price it would bring at a fair, voluntary sale, and if any property in said districts was assessed at less than its fair cash value, it was unintentional on the part of this affiant.

Affiant further states that he never, at any time, nor did his superior, J. F. Asher, the assessor, nor any of his deputies, to affiant's knowledge, enter into any agreement or understanding with any other officer of the state or county, whose duty it was to assess property for taxation, or with any one else, that property should be assessed at less than its fair cash value, estimated at the price it would bring at a fair volunrary sale, and he never heard of any such understanding or agreement.

(Signed) W. E. TURNER.

Subscribed and sworn to before me by Ed Turner this April 29th, 1914.

R. B. RICE, *Clerk*,
By H. CLAY RICE, *D. C.*"

846 "STATE OF KENTUCKY,
Bell County:

The affiant, Henry Thompson, states that he is a citizen and resident of Bell County, Kentucky, and that J. F. Asher was the regularly elected, qualified and acting Assessor of Bell County,

Kentucky, during the years 1910, 1911, 1912, and 1913; and that during the years 1911 and 1912, this affiant acted as the Deputy Assessor for the fifth and eighth magisterial district of Bell County, Kentucky, and assessed all of the property subject to assessment in those districts for the said two years; that in assessing the property for taxation in said districts and county for said years this affiant endeavored to follow the law and assess all property at its fair cash value, estimated at the price it would bring at a fair, voluntary sale, and if any property in said di*d*stricts and county was assessed at less than such fair cash value, it was unintentional on the part of this affiant.

Affiant says that he never at any time, nor did his superior, said J. F. Asher, or any of his other deputies, to affiant's knowledge, enter *u*nto any agreement or understanding with any other officer in this State, whose duty it was to assess property for taxes, or any one else, that property should be assessed at less than its fair cash value, estimated at the price it would bring at a fair voluntary sale, and he never heard of any such understanding or agreement; and further he says that no property was ever intentionally assessed by him for less than such fair cash value; and if he so assessed any property at less than its fair cash value it was on account of mistake for lack of proper evidence as to its value and not through any intention on the part of this affiant.

Affiant further states that he understands that at present J. F. Asher, the Ex-Assessor of the County, is now out of Bell County.

HENRY THOMPSON.

Subscribed and sworn to before me by said Henry Thompson this April 28, 1914. My commission expires Jan. 28, 1918.

MABEL OSBORN,
N. P. B. Co., Ky."

"STATE OF KENTUCKY,
Bell County:

The affiant, John A. Rice, states that he is a resident and citizen of Bell County, Kentucky, and that J. F. Asher, was the regularly elected, qualified and acting Assessor of Bell County, Kentucky, during the years 1910, 1911, 1912, and 1913; and that during the year 1911 this affiant acted as the Deputy Assessor for the Second Magisterial District of Bell County, Kentucky, and assessed all of the property subject to assessment in that district for that year; that in assessing the property for taxation in said district and county for said year this affiant endeavored to follow the law and assess all property at its fair cash value, estimated at the price it would bring at a fair, voluntary sale, and if any property in said district and county was assessed at less than such fair cash value, it was unintentional on the part of this affiant.

Affiant says that he never at any time, nor did his superior, said J. F. Asher, or any of his other deputies, to affiant's knowledge, enter into any agreement or understanding with any other officer in this state, whose duty it was to assess property for taxes, or any

one else, that property should be assessed at less than its fair cash value, estimated at the price it would bring at a fair voluntary sale, and he never heard of any such understanding or agreement; and further he says that no property was ever intentionally assessed by him for less than such fair cash value; and if he so assessed any property at less than its fair cash value, it was on account of mistake for lack of proper evidence as to its value and not through any intention on the part of this affiant.

847 Affiant further states that he understands that at present J. F. Asher, the Ex-assessor of the county is now out of Bell County.

JOHN A. RICE.

Subscribed and sworn to before me by John A. Rice, this April 24, 1914.

My commission as Notary will expire on January 28, 1918.

MABEL OSBORNE,
Notary Public, Bell County, Ky."

"STATE OF KENTUCKY,
Bell County:

The affiant, J. F. Rice, states that he is a resident and citizen of Bell County, Kentucky, and is the present Assessor of Bell County, having been elected in November, 1913; that the Assessor preceding him was J. F. Asher, who is now absent from Bell County.

He states that during the years 1911 and 1912 he was the chief deputy assessor of said J. F. Asher and had complete charge of the making of the assessment of the county for those two years, employing all the deputy assessors and having supervision over them and that during those two years affiant individually made the assessment for the first and the sixth magisterial district of Bell County, which contain over one-half of the assessed valuation of the county; that during the year 1910 he acted as Deputy Assessor for the said J. F. Asher and for that year assessed the first and sixth magisterial districts himself; and for the year 1913 he also assessed the first and sixth magisterial districts aforesaid; and that in assessing the property for taxation in said county for said years, affiant endeavored to follow the law and assess all property at its fair cash value, estimated at the price it would bring at a fair, voluntary sale, and if any property in said county was assessed at less than said fair cash value it was unintentional on the part of the officers in the county whose duty it was to assess the property for taxation.

Affiant says that he never at any time, nor did any of the deputies employed by him, nor did the Assessor himself, to-wit, the said J. F. Asher, to this affiant's knowledge, enter into any agreement or understanding with any other officer in the State, whose duty it was to assess property for taxation, or with any one else, that property should be assessed at less than its fair cash value, estimated at the price it would bring at a fair voluntary sale and that he never heard of any such understanding or agreement and is convinced that none such existed; and further, he says that no property was ever inten-

tionally assessed by him or by his direction for less than such fair cash value, and if he so assessed any property at less than its fair cash value, it was on account of mistake for lack of proper evidence as to its value and not of any wrongful intention on the part of this affiant.

J. F. RICE.

Subscribed and sworn to before me by J. F. Rice, this April 24th, 1914. My commission as Notary Public will expire on the 28th day of January, 1918.

MABEL OSBORNE,
Notary Public, Bell County, Ky."

Defendants also read in evidence the affidavit of J. E. Robertson of Carroll County, as follows:

"STATE OF KENTUCKY,
County of Carroll, sct:

The affiant J. E. Robertson, says that he was the duly elected, qualified and acting assessor of Carroll County, Kentucky, during the years 1910, 1911, 1912 and 1913; that in assessing property for taxation in said county for said years, affiant assessed all real estate that was on the "transfer sheet," that is, all real estate that
848 had been sold during the year just previous to the assessment, at 80 per cent of its purchase price as shown by the records, the deeds; all other property was listed by the owner or agent under the oath prescribed by law.

J. E. ROBERTSON.

Subscribed and sworn to before me by J. E. Robertson this 19th day of May, 1914.

WM. DEATHRAGE,
Clerk Carroll County Court."

Defendants also read in evidence the following affidavit made by six residents of Taylor County, to-wit:

"Affidavit.

We, the undersigned affiants and citizens of Taylor County, after being duly sworn, state under oath, that we are acquainted with the cash values of real estate in this, Taylor County; that we are also familiar with the assessment of real estate in this county, as fixed by the Board of Equalizers.

That the assessment of real estate in this county will run from 60 to 90% of its cash value.

That Taylor County is laboring under a bonded debt of over -300,000 (about 1/7 of total assessment for the county) which tends to demoralize real estate values.

That in fact, real estate in this county has no fixed cash value, and will not have so long as its burden of indebtedness is so great.

That, at a very recent sale, a piece of property known as the Dooly property, and assessed for taxation at $1,000.00, sold at the Court House door, on a credit of six months, at $1,000.00.

J. W. CLOYD.
HENRY R. TURNER.
T. W. BUCHANAN.
W. I. MEADER,
Clerk Taylor Circuit Court.
G. D. SMITH.
J. R. SAUNDERS,
County Att'y.

Subscribed and sworn to before me by J. W. Cloyd, Henry R. Turner, T. W. Buchanan, W. I. Meader, G. D. Smith and J. R. Sanders. This 24th day of November, 1913.

S. E. KERR,
Clerk Taylor County Court."

Defendants also read five affidavits from the following persons: Elliott Graham, J. M. McShreve, W. F. Milby, L. E. McGinnis and Ellis Workman, residents of Green County, each on the following form, except as to name of affiant:

"STATE OF KENTUCKY,
County of Green, ss:

The affiant Elliott Graham, states that he is the duly elected and acting County Judge of Green County, Kentucky, and was such official on all the dates hereinafter mentioned; that he is acquainted with the property values in said county; that on the 1st day of September, 1912, and for many years prior thereto there were existing against said county judgments on old railroad bonds, in the District Court of the United States for the Western District of Kentucky, to the amount of over two hundred and seventy five thousand
849 dollars; that by reason of said judgments the property value of said county is greatly depreciated in value, and is of comparatively low values when compared with the property values of counties neighboring said Green County; that owing to said judgments said county has been unable to have a sheriff for many years, and that at the present time there are against said county mandamus proceedings instituted by said judgment holders, which make it impossible to get any one to serve as collector of the county revenue, and that at the present time said county has no such collector; that by reason of these judgments and mandamus proceedings against said county, the property values are very low, and comparatively all the sales of land in said county are made to residents of the county, very few persons coming into the county for the purpose of investing in property in said county; that said conditions have a strong tendency to stagnate business and drive capital from said county.

He says that by reason of the foregoing conditions he considers and verily believe- that the property of Green County, on September 1st, 1912, was assessed at a reasonable per cent of its fair cash value,

estimated at the price it would bring at a fair voluntary sale, under said conditions.

ELLIOTT GRAHAM.

Subscribed and sworn to before me by Elliott Graham, this November 22, 1913."

——— ———,
——— ———.

Defendants also read in evidence the affidavits of A. D. Patteson and N. H. Moss of Adair County on the following form:

"STATE OF KENTUCKY,
County of Adair, ss:

The affiant states that he is sheriff of Adair County; that he is acquainted with the people and the property of said county, and in the discharge of his official duties, it has become necessary for him to and he has become acquainted with the assessment made as of September 1, 1912; that he knows the property located in said county and the value of such property. He states that he believes the people of said county, generally, endeavored to list their property at what they considered its fair cash value, and that the assessor endeavored to assess the property of said county at what he believes is its fair cash value; and that the Board of Equalization of said county endeavored to require said property to be assessed and equalized at what they considered its fair cash value, and at not less than 80% of its real value. This affiant is of the opinion that the property assessed in said county has been assessed and equalized at not less than 80% of its fair cash value.

A. D. PATTESON.

Subscribed and sworn to before me this 26 day of November, 1913.
WALKER BRYANT,
Clerk Adair County Court."

The defendants also read in evidence the affidavits of W. R. Rogers and B. B. Hume of Boone County, each on the following form, to-wit:

"STATE OF KENTUCKY,
County of Boone, ss:

The affiant states that he is W. R. Rogers, County Court Clerk of Boone County; that he is acquainted with the people and property of said county, and in the discharge of his official duties, it has become necessary for him to and he has become acquainted with the assessment made as of September 1, 1912; that he knows the property located in said county and the value of such property. He states that he believes the people of said county, generally, endeavored to list their property at what they considered its fair cash
850 value, and that the assessor endeavored to assess the property of said county at what he believes is its fair cash value; and

that the Board of Equalization of said county endeavor to require said property to be assessed and equalized at what they considered its fair cash value, and at not less than 80% of its real value. This affiant is of the opinion that the property assessed in said county has been assessed and equalized at not less than 80% of its fair cash value.

W. R. ROGERS.

Subscribed and sworn to before me this 1 day of December 1913.
[SEAL.] W. E. RIDDELL,
Notary Public, Boone Co., Ky."

The defendants also read in evidence the affidavits of D. F. Logan, J. B. Nichols, and N. K. Tunis of Boyle County, each in the following form, to-wit:

"STATE OF KENTUCKY,
County of Boyle, sct:

The affiant, D. F. Logan, says that he is assessor for Boyle County, Kentucky, and that he is reasonably well acquainted with the people of Boyle County, and feels that he is reasonably well informed on property valuation and assessment in said county, and with the assessment of September 1st, 1912, for State and County purposes therein, and says that it is the intention of the Assessor to assess real estate and personal property other than notes, bonds and the like, at 80 per cent of its fair cash value and of the Board of Equalization to equalize same at 80 per cent of its fair cash value, but that as he is informed, notes, bonds and the like which are good and were assessed and taxed at the face or par value thereof, in said county, for State and county school purposes, and says that as he is informed, for about the past three years, where there has been a sale of real estate, that at the first assessment period thereafter it has been the custom to assess same for taxation at 80 per cent of the sale price thereof, and for taxes to be paid thereon at 80 per cent of the sale price thereof, and that prior to said period of about three years ago, it was the custom in said county to assess real estate which had been sold at the sale price thereof, and for taxes to be paid thereon at the sale price thereof at the period for assessment and taxation next subsequent to said sales, and that as he is informed, thereafter the valuation of real estate so sold and so taxed, at the first period next after sale, was customarily by the Board of Equalization of said County equalized with other real estate in the neighborhood or other real estate in the neighborhood equalized to it.

Affiant says that the foregoing statements are true, as he verily believes.

D. F. LOGAN.

Subscribed and sworn to before me by D. F. Logan, this November 25, 1913.

J. B. NICHOLS, *Clk.*,
By LUCH A. MINOR,
D. C. of Boyle Co."

Defendants also read in evidence the affidavits of D. W. Scott and Thomas C. Bradley of Fayette County, as follows:

"STATE OF KENTUCKY,
County of Fayette, ss:

Affiant, D. W. Scott, being first duly sworn, says that he is sheriff of above mentioned county; that he is familiar with the value of property subject to taxation in said county and that he believes the same is assessed for purposes of taxation at an amount equal to 80% of the cash value of same.

D. W. SCOTT.
S. F. C.

Subscribed and sworn to before me by D. W. Scott this 22nd day of November, 1913.
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THEO. LEWIS,
Clerk Fayette County Court,
By C. J. REAGAN, *D. C.*"

"STATE OF KENTUCKY,
County of Fayette, ss:

Affiant, Thomas Bradley, being first duly sworn, says he is Assessor of above mentioned county; that he is familiar with values of property in said county subject to taxation and that the same is assessed for purposes of taxation at a value equal to the price the same would bring at a fair voluntary sale.

The affiant further says that in all cases where the consideration is contained in a deed for real estate the same is assessed for purposes of taxation at an amount equal to 80% of said consideration.

THOMAS C. BRADLEY,
Assessor of Fayette County.

Subscribed and sworn to before me by Thomas Bradley this 22nd day of November, 1913.

THEO. LEWIS,
Clerk Fayette County Court,
By C. J. REAGAN, *D. C.*"

The defendants also read the affidavit of John B. Dillon of Kenton County, as follows:

"Affiant, John B. Dillon says that he is the Kenton County Court Clerk and is acquainted with the value of property located in said County assessed by the County Assessor thereof. That in the discharge of his official duties it was necessary for him to make and deliver to the Assessor of said County a list of the transfers of real estate made in said county for the last four years; that he is acquainted with the value of said property so transferred in said county and the true consideration expressed in the deeds transferring same; that from this source of information and other information he has on the subject he is convinced and believes that all property in the County is generally assessed at 80% of its real cash value; that

the County Assessor for the year 1913 and the years next preceding assessed property in said county, at not less than 80% of its fair cash value and that the Board of Supervisors of said County has required the property in said County to be assessed at not less than 80% of its fair cash value.

Subscribed and sworn to before me this — day of November, 1913.

JOHN B. DILLON,
Clerk Kenton County.

Subscribed and sworn to before me by Jno. B. Dillon, County Clerk of Kenton County, this 24th day of November, 1913.

MARGARET H. HELLEBUSH,
Notary Public, Kenton County, Ky.

My commission expires March 10, 1914."

Defendants also read in evidence the affidavits of Muir Weissinger, Harry W. Russell, A. M. Emler, Edward A. Barry, and Walter S. Miller, of Jefferson County, each on the following form, to-wit:

"STATE OF KENTUCKY,
County of Jefferson, set:

Affidavit of Muir Weissinger, County Judge.

I am County Judge of Jefferson County, Kentucky, and am well acquainted with the people and the property located in Louisville and Jefferson County.

In the discharge of my official duties, I have become necessarily acquainted with the property in Louisville and Jefferson County, made as of September 1, 1912, and am acquainted and famil-
852 iar with the value of the property located throughout said City and County.

I believe that the citizens of Louisville and Jefferson County generally, have endeavored to list their property at what they considered at least 80% of its fair cash value, and that the Board of Supervisors of said County has endeavored to equalize the property of said county for at least 80 per cent of its fair cash value.

I am of the opinion that the property assessed in said County has been assessed for at least 80% of its fair cash value.

MUIR WEISSINGER.

Subscribed and sworn to before me by Muir Weissinger this 24 day of November, 1913. My commission expires on the 12 day of January, 1914.

J. L. SULLIVAN,
Notary Public, Jefferson County, Ky."

Defendants also read in evidence the affidavits of G. B. Cadper, Jas. P. Bailey, W. L. McCarty and John C. Peppler of Lincoln County, each on the following form, to-wit:

"STATE OF KENTUCKY,
County of Lincoln, sct:

The affiant states that he is County Court Clerk of Lincoln County; that he is acquainted with the property and people of Lincoln County, and in the discharge of his official duties, it has become necessary for him to, and he has become acquainted with the assessment made as of September 1, 1912; that he knows the property located in said County and the value of such property.

He states that he believes that the property that has been transferred in said County during the last four years and in the year 1912, has been universally listed at 80% of its fair cash value, by property he means real estate, and that the Assessor endeavored to assess said transfers of real estate for the year of 1912, and for the four years preceding at 80% of the transfer value, and that the Board of Equalization endeavored to assess all property that had been transferred at 80% of its value. He states further that all personal property, such as money, and notes are listed at their real value. He states further that the banks are listed on their capital and surplus at 80% of their book value; he states that it is impossible to arrive at the value of property otherwise than *at* having been transferred within the last four or five years.

G. B. CADPER.

Subscribed and sworn to before me this the 24 day of November 1913.

JAS. P. BAILEY."

Defendants also read in evidence the affidavits of F. Boone Rapier, W. J. Roby, and R. L. Hagan of Nelson County, in the following form, to-wit:

"STATE OF KENTUCKY,
County of Nelson, ss:

The affiant states that he is F. Boone Rapier, County Judge of Nelson County; that he is acquainted with the people and the property of said county, and in the discharge of his official duties, it has become necessary for him to and he has become acquainted with the assessment made as of September 1, 1912; that he knows the property located in said county and the value of such property.

853 He states that he believes the people of said county, generally, endeavored to list their property at what they considered its fair cash value, and that the assessor endeavored to assess the property of said county at what he believes is its fair cash value; and that the Board of Equalization of said county endeavored to require said property to be assessed and equalized at what they considered its fair cash value, and at not less than 80% of its real value. This affiant is of the opinion that the property assessed in said county has been assessed and equalized at not less than 80% of its fair cash value.

F. BOONE RAPIER.

Subscribed and sworn to before me by F. Boone Rapier, this 25th day of Nov., 1913.

W. J. ROBY,
Deputy Clerk, Nelson County Court."

And defendants also read the additional affidavit of Hubert Hinkle of Nelson County, as follows, to-wit:

"STATE OF KENTUCKY,
County of Nelson, ss:

The affiant states that he is the Deputy Assessor of Nelson County, and as such, made the assessment as of September 1, 1912; he is acquainted with the property located in said county and its value. In making said assessment, it was his purpose to require the property owners to list their property at its fair cash value, and he endeavored to and did assess the property of said county at its fair cash value; and he believes that the assessment of said year, as supervised and equalized, is not less than 80% of the fair cash value of the property so assessed.

HUBERT HINKLE,
Deputy Assessor.

Subscribed and sworn to before me by Hubert Hinkle, this the 25th day of Nov., 1913.

F. BOONE RAPIER,
Judge Nelson County Court, Nelson Co., Ky."

Defendants read in evidence the following letters:

"LOUISVILLE, KY., February 27, 1914.

Mr. Chas. J. Veling, Chief Clerk, Corporation Department, Office of Auditor of Public Accounts, Frankfort, Ky.

DEAR SIR: Referring to your letter of the 25th inst., and also referring to your visit to my office this morning, in which we talked this matter over and agreed that it would be sufficient to have you certify to the various taxing districts on the M. H. & E. M. & A., and W. & B. M. Railroad, the necessary assessments for the year 1912, and that it would not be necessary to make a re-apportionment of the franchise assessment for the year 1912 on the taxing districts located along the lines of the L. & N. R. R. Co. proper.

I write this letter to confirm our understanding arrived at said conference this morning.

The apportionment of said franchise for the year 1913 will be in accordance with my letter addressed to the Hon. H. M. Bosworth, Auditor of Public Accounts, February 17, 1914.

Yours truly,

C. O. BRADFORD,
Real Estate Agent."

"LOUISVILLE, KY., February 17th, 1914.

854 Hon. H. M. Bosworth, Auditor of Public Accounts, Frankfort, Ky.

DEAR SIR: Referring to conference that I had last Thursday with Hon. James Garnett, Attorney General and Mr. Chas. J. Veling, of your office, relative to the apportionment of the franchise assessment of the L. & N. R. R. Co., in Kentucky for the years 1912 and 1913.

As you well know, the assessment for 1912 has been certified by you to the various taxing districts in the State of Kentucky on a mileage which was furnished your office by myself, being the mileage for the L. & N. R. R. Co. proper, amounting to 1,354.66 miles. I am now of the opinion that we made a mistake in furnishing you with the said mileage amounting to 1,354.66 over which the said franchise assessment amounting to $22,899,200.00 was to be apportioned. I now believe that the mileage over which this franchise assessment should have been apportioned should have included the taxing districts situated on the Madisonville, Hartford & Eastern R. R. amounting to 55.48 miles, the Morganfield & Atlanta R. R., amounting to 25.35 miles and the Wasioto & Black Mountain R. R., amounting to 34.62 miles, making the total mileage for the year 1912, 1,470.11 miles instead of 1,354.66 miles. I further am of the opinion that this mistake which was made should be corrected, so that the taxing districts on the said three last named railroads should have their correct proportion of the taxes for the year 1912. With this end in view, I would suggest the following plan to be adopted by which all of the taxing districts situated along the line of the L. & N. R. R. Co. proper and the three railroads named, would receive their just proportion of the taxes upon the assessment of $22,899,200.00, both for the years 1912 and 1913. Inasmuch as the taxes have now all been paid upon the assessment for the year 1912 upon the apportionment which has been made, it will be necessary that sufficient deductions be made from the assessment for the year 1913, amounting to $22,899,200, to give to each of the taxing districts upon the three railroads heretofore mentioned, their just proportion of the taxes for both the years 1912 and 1913.

The rate upon which the apportionment was made for the year 1912, was $16,904.00 per mile. If the M. H. & E., the M. & A. and the W. & B. M. R. R. Cos. had been included for said year, the rate per mile would have been $15,576.52. Of the total amount of the assessment for franchise purposes, the part which should have been apportioned to the counties, etc. located on the M. H. & E., the M. & A. and the W. & B. M. should have been 115.45 (being the total mileage of the said three roads for the year 1912) times $15,576.52 or $1,798,309.00. For the franchise year 1913, the rate per mile, including the M. H. & E., the M. & A., and the W. & B. M. will be $15,087.10 per mile. Of the total assessment, 148.95 miles (being the total mileage of these three roads for the year 1913) times $15,087.10, or $2,247,223, should be first deducted to be apportioned to the taxing districts on the said M. H. & E., M. & A., and W. & B. M. There should be further deducted from the total franchise assessment for the year 1913, the above $1,798,309.00, making the

total franchise assessment to be used in apportioning to the taxing districts upon the said three roads their correct and just proportion of said assessment for the two years, namely, 1912 and 1913, making a total of $4,045,533.00, which deducted from the said $22,899,200.00 would leave a balance of $18,853,667.00 which should be apportioned to the taxing districts on the lines comprising the L. & N. R. R. proper, said mileage being for the year 1913, 1,368.85 miles, which would make the rate per mile to be distributed to said taxing districts on the L. & N. lines proper, $13,773.36 per mile for the franchise year 1913.

I send you herewith a statement of the mileage of the L. & N. R. R. Co., proper, in the State of Kentucky for the franchise year 1912, amounting to 1,354.66 miles, added to which the mileage for the three roads referred to for the year 1912, would make the total mileage for the franchise year 1912, 1,470.11 miles, also a statement showing the mileage of the L. & N. R. R. Co. proper in the State of Kentucky for the franchise year 1913, amounting to 1,368.85 miles, added to which the three roads referred to would make a total mileage of 1,517.80 miles.

855 I would respectfully request that you reapportion and recertify to the various taxing districts a new apportionment for the year 1912, and also on the above basis certify to them an apportionment of the assessment for the franchise year 1913.

Yours truly,

C. O. BRADFORD,
Real Estate Agent."

"*Statement of the Mileage of the Louisville & Nashville Railroad Company Proper in the State of Kentucky for the Franchise Year* 1912.

Name of road, division or branch.	Number of miles.
Bardstown Branch	17.34
Bloomfield Branch	26.72
Cincinnati Div	114.00
Chesapeake & Nashville Div	9.83
Clarksville & Princeton Div	23.17
Cumberland Valley Div	46.90
Chenoa Branch	12.62
Greensburg Branch	30.90
Henderson Division	97.76
Henderson Bridge	0.47
Madisonville & Providence Br	16.10
Kentucky Div., Main Line	184.85
Lexington & Paris Br	17.86
Paris & Maysville Br	49.32
Richmond Br	30.46
Knoxville Division	30.06
Halsey Branch	6.33
Jellico Branch	3.19

Kensee Branch	1.72
Pine Mountain Branch	21.53
Wilton Branch	3.90
Lebanon Branch	107.22
Lexington Branch	66.03
Shelby Cut-Off	8.51
Louisville & Nashville, Main Stem	139.90
Louisville, Harrods Creek & Westport	3.46
Louisville & Atlantic Division	103.11
Memphis Line	46.46
Middlesboro R. R.	12.11
Newport & Cincinnati Bridge	0.54
Owensboro & Nashville Div	83.46
Shelby Branch	18.76
Springfield Branch	20.07
Mileage upon which 1912 assessment was distributed	1,354.66

Mileage upon which 1912 assessment would have been distributed if Madisonville, Hartford & Eastern, Morganfield & Atlanta and the Wasioto & Black Mountain had been included:

Madisonville, Hartford & Eastern	55.48
Morganfield & Atlanta	25.35
Wasioto & Black Mountain	34.62
Total	1,470.11

Office of Real Estate Agent, Louisville, Ky., February 17th, 1914."

"Statement of the Mileage of the Louisville & Nashville Railroad Company Proper in the State of Kentucky for the Franchise Year 1913.

Name of road, division or branch.	Number of miles.
Main Stem	139.90
Bardstown Branch	17.34
Bloomfield Branch	26.72
Chesapeake & Nashville Div	9.83
856 Cincinnati Division	114.00
Clarksville & Princeton	23.17
Cumberland Valley	46.90
Chenoa Branch	12.62
Straight Creek Branch	6.00
Greensburg Branch	30.90
Henderson Division	98.43
Earlington Cut Off	7.75
Madisonville Branch	16.10
Kentucky Div., Main Line	184.85

Paris & Lexington Br.	17.86
Paris & Maysville Br.	49.32
Richmond Br.	30.46
Knoxville Division	30.06
Halsey Branch	6.33
Jellico Branch	3.19
Kensee Branch	1.72
Pine Mountain	21.53
Wilton Branch	3.90
Lebanon Branch	107.22
Lexington Branch	66.03
Shelby Cut Off	8.51
L. H. C. & W.	3.46
Louisville & Atlantic	103.11
Memphis Line	46.46
Owensboro & Nashville	83.46
Shelby Branch	18.63
Springfield Branch	20.07
Newport & Cincinnati Bridge	0.54
Henderson Bridge	0.47
Total L. & N. Lines proper	1,368.85
Madisonville, Hartford & Eastern	55.48
Morganfield & Atlanta	25.35
Wasioto & Black Mountain	68.12
Total	1,517.80

Office of Real Estate Agent, Louisville, Ky., February 17th, 1914."

"LOUISVILLE, KY., February 23, 1914.

L. & N. Franchise Taxes in Kentucky for years 1912 and 1913.

Hon. H. M. Bosworth, Auditor of Public Accounts, Frankfort, Ky.

DEAR SIR: Mr. C. O. Bradford, our Real Estate Agent, has reported to me the interviews which he has had with you and the Attorney General on the above subject.

He says the Attorney General was of the opinion that you could not now make a re-apportionment of the franchise assessment for 1912, unless we were willing to write a letter to you, admitting that a mistake had been made in sending out the certificates of the mileage over which the assessment for 1912 should have been apportioned, the same not having included the railroads of the three companies known as the Madisonville, Hartford & Eastern R. R. the Morganfiled & Atlanta R. R. and the Wasioto & Black Mountain R. R. Certainly a mistake both of law and of fact was committed in the certification of the franchise assessment of this company so far as made and certified for the year 1912, under the opinion of the Attorney General, in which I concur, and said mistake ought to be rectified, although I was heretofore of the opinion that these

three lines should not be included in the certification for 1912.

857 Mr. Bradford has also prepared a letter addressed to you, which is herewith enclosed, setting forth the situation growing out of this mistake, as he understands it, and in accordance therewith the manner in which, in his judgment, the matter will have to be handled. I think what he states therein will be all the information you desire in order to correct this mistake and do justice to all parties concerned and equalize the counties, cities, towns and taxing districts that received nothing for the year 1912 with those which received the assessment certified for 1912. The effect of this equalization will be to give the counties, cities, towns and taxing districts through which the three lines above mentioned ran in 1912 what they should have received in the certification for that year, and the amount apportioned to them for 1912 will have to be deducted from the amounts to be certified to the other counties, cities, towns and taxing districts for 1913.

Mr. Bradford in his letter to you points out how this can and should be done which plan I approve. If, in order to carry out this plan of rectifying the mistake aforesaid, any further information is needed or assistance from Mr. Bradford or myself is desired, the same will be cheerfully and promptly attended to.

Of course, the amount for each year certified on the mileage in the counties through which said three lines run will be apportioned to the cities, towns, and taxing districts in said counties in proporton to the length of such mileage contained in said cities, towns and taxing districts, respectively.

The statements enclosed with Mr. Bradford's letter show the mileage of each line in the State, and the reports of this Company will show through what counties, cities, towns and taxing districts said lines run in each year.

Respectfully yours,

H. L. STONE,
General Counsel.

Encls.

Cy Mr. C. O. Bradford, Real Estate Agent.

P. S.—I note in the last paragraph of Mr. Bradford's letter dated 17th inst., herewith enclosed, he suggests that you re-apportion and recertify to the various taxing districts a new apportionment for the year 1912. I do not regard that as necessary at all, unless he means the counties, cities, towns and taxing districts through which the above mentioned three lines run alone, for they are entitled to their shares of the 1912 assessment, which should be added to their shares of the 1913 assessment, and the certificates therefor should be issued separately to those particular counties, cities, towns and taxing districts, but there need not be but one certificate sent out to the counties, cities, towns and taxing districts through which the Company's other lines run for their proper shares of the 1913 assessment, after equalizing the counties, cities, towns and taxing districts through which said three lines run for the year 1913.

H. L. S."

"LOUISVILLE, KY., February 27th, 1914.

Mr. Chas. J. Veling,
Chief Clerk, Corporation Department, Office of Auditor of Public Accounts, Frankfort, Ky.

DEAR SIR: Referring to your letter of the 25th inst., and also referring to your visit to my office this morning, in which we talked this matter over and agreed that it would be sufficient to have you certify to the various taxing districts on the M. H. & E., M. & A. and W. & B. M. Railroads, the necessary assessments for the year 1912, and that it would not be necessary to make
858 a re-apportionment of the franchise assessment for the year 1912 on the taxing districts located along the lines of the L. & N. R. R. Co. proper.

I write this letter to confirm our understanding arrived at said conference this morning.

The apportionment of said franchise for the year 1913 will be in accordance with my letter addressed to the Hon. H. M. Bosworth, Auditor of Public Accounts, February 17th, 1914.

Yours truly,

C. O. BRADFORD,
Real Estate Agent."

The foregoing letters being in addition to letters read before the Board of Valuation and Assessment, to-wit:

Letter of October 12, 1910, from Charles Haydon, Comptroller, to F. P. James, Auditor.

Letter of December 19, 1912, from C. O. Bradford, Real Estate Agent, to H. M. Bosworth, Auditor, and

Letter of December 20, 1912, from H. M. Bosworth, Auditor to C. O. Bradford, Real Estate Agent.

Which three letters have heretofore been set forth herein.

Defendants read a portion of the return of the Louisville & Nashville Railroad Company to the Auditor for the year 1913, as follows, to-wit:

859 For Auditor.

Return to the Auditor of Public Accounts of Taxable Property in the State of Kentucky.

By the Louisville & Nashville Railroad Company, for the Year 1913.

Received July 26, 1913. Auditor's Office.

860 *Statement of Length of all Railroads on Which Rolling Stock Belonging to the Louisville and Nashville Railroad Company is Operated.*

Name of road, division or branch.	Miles.
Alabama & Florida Division	100.38
Florala Branch	23.48
Lakewood Branch	2.80
Yellow River Branch	26.40
Atlanta Division—New Line	89.38
Old Line	149.24
Murphy Branch	23.43
Alabama Mineral Division	131.16
Bardstown Branch	17.34
Bay Minette & Fort Morgan Branch	36.52
Birmingham Mineral Division	248.84
Long Branch Coal Road	7.90
Bloomfield Branch	26.72
Chesapeake & Nashville Division	46.36
Cincinnati Division—Main Line	110.91
Branch to First and Water Street	1.71
Branch "A" Street to South Louisville	1.38
Clarksville Mineral Division	30.73
Van Leer Spur	6.19
Clarksville & Princeton Division	32.00
Cumberland Valley Division	117.22
Chenoa Branch	12.62
Pennington Branch	1.99
Straight Creek Branch	6.04
Elkton & Guthrie Railroad	10.92
Glasgow Railroad	10.50
Greensburg Branch	30.90
Henderson Bridge Railroad	10.04
Henderson Division	136.84
Erlington Cut Off	7.75
Madisonville & Providence Branch	16.10
Kentucky Division—Main Line	184.85
Lexington & Paris Branch	17.86
Paris & Maysville Branch	49.32
Richmond & Rowland Branch	30.46
Kentucky Highland Railroad	15.88

Knoxville Division	162.47
Cow Creek Branch	12.27
Halsey Branch	6.33
Jellico Branch	3.19
Maryville Branch	3.81
Kensee Branch	1.72
Carried forward	1961.95

861

Brought Forward	1,961.95
Knoxville Division—Mentor Jena Branch	18.90
Continued Pine Mountain Branch	21.53
Harriman Knoxville & Eastern Branch	17.43
Wilton Branch	3.90
Hog Camp Branch	2.93
Clear Fork Branch	2.21
Athens & Jellico Branch	22.22
Lebanon Branch	107.22
Lexington Branch	66.03
Shelby Cut Off	8.51
Lexington & Eastern Railroad	195.53
Louisville & Nashville—Main Line	185.885
Louisville & Atlantic Division	100.15
Sturgeon Creek Branch	2.96
Louisville Harrods Creek & Westport Branch	3.46
Madisonville Hartford & Eastern (Operated jointly with L. H. & St. L.) ½ of	55.48
Memphis Line	256.60
Leewood to Main Street Memphis	4.98
Middlesborough Railroad	8.80
Stoney Fork Branch	6.08
Mobile & Montgomery Division	177.67
Montgomery & Prahville Branch	10.35
Morganfield & Atlanta Railroad	25.35
Nashville & Decatur Division	118.98
Nashville Florence & Sheffield Division	79.97
Napier Branch	10.92
West Point Branch	11.78
Sheffield & Tuscumbia Branch	2.61
Cench Branch	1.18
New Orleans & Mobile Division	141.17
Newport & Cincinnati Bridge	0.90
Owensboro & Nashville Division	83.46
Pensacola Division	44.64
Pensacola & Atlantic Division	160.47
Pontichartrain Railroad	4.96
Saint Louis Division	160.96
Shawneetown Branch	40.70
O'Fallen Branch	6.04
Shelby Branch	18.53

Southern Alabama Division	111.09.
Camden Branch	16.55
Myrtlewood Branch	60.25
South & North Alabama Division	194.23
Wetumpka Branch	6.23
Springfield Branch	20.07
Stouts Mountain Railroad	5.91
Swan Creek Railroad	17.10
Tuscaloosa Mineral Railroad	17.73
Wasioto & Black Mountain Railroad	73.13
Carried Forward	4,675.685

862

Brought Forward	4,675.685

Terminal and Connecting Roads.

Atlanta & Birmingham Air Line Railway	
Wellington, Ala. to Carterville, Ga.	77.40
Atlantic Coast Line Railway; Track at River June., Fla.	1.04
Baltimore & Ohio Southwestern Railway; Track at East St. Louis	0.11
Chesapeake & Ohio Railway; Track at Lexington	0.20
Cincinnati & Covington Elevated Railroad Bridge and Terminal	2.18
Lexington Union Railway Co.; Track at Lexington	0.22
Louisville & Interurban Railway	7.70
Louisville Henderson & St. Louis Railway; Track at Owensboro	0.26
Nashville Chattanooga & St. Louis Railway	
Aulon to Memphis	5.46
Moragne to Attalla	2.01
Junta to Atlanta	48.09
Track at Gadsden	0.74
Nashville Terminals	1.07
Norfolk & Western Railway	0.77
Pittsburg Cincinnati Chicago & St. Louis Railway Track at Cincinnati	0.44
Providence Coal Company; Track at Providence, Ky.	0.30
St. Louis Terminal Association	3.84
Southern Railway—M. & C. Junction to Decatur	1.71
Florence to Sheffield	2.90
Gurnee Junction to Blocton	14.30
Aden to Masena	5.60
Seymour to end of Track	3.91
Ardela to Hansel	2.90
Hyde to Fone	11.21
C. T. R. & S. Co.	0.654
Straight Coal & Coke Co.—St. Creek to Blanche	3.89

Virginia & Southwestern Railway—near Appalachia to Big Stone Gap Furnace	3.77
Pocket to Darbyville	11.88
Western Railway of Alabama; Track at Selma	0.87
Woodstock & Blocton; Blocton Junction to Blocton	7.73
Total	4,898.839

863 *Statement of Length of all Railroads Operated by the Louisville and Nashville Railroad Company in the State of Kentucky.*

Name of road, division or branch.	Miles.
Bardstown Branch	17.34
Bloomfield Branch	26.72
Chesapeake & Nashville Division	9.83
Cincinnati Division	110.91
Branch to First & Water Street	1.71
Branch "A" Street to South Louisville	1.38
Clarksville & Princeton Division	23.17
Cumberland Valley Division	46.90
Chenoa Branch	12.62
Straight Creek Branch	6.04
Elkton & Guthrie Railroad (Taxes paid by Lessor)	10.92
Glasgow Railroad (Taxes paid by Lessor)	10.50
Greensburg Branch	30.90
Henderson Bridge Railroad	0.47
Henderson Division	98.43
Earlington Cut Off	7.75
Madisonville & Providence Branch	16.10
Kentucky Highland Railroad	15.88
Kentucky Division—Main Line	184.85
Lexington & Paris Branch	17.86
Paris & Maysville Branch	49.32
Richmond & Rowland Branch	30.46
Knoxville Division	30.06
Halsey Branch	6.33
Jellico Branch	3.19
Kensee Branch	1.72
Pine Mountain Branch	21.53
Wilton Branch	3.90
Lebanon Branch	107.22
Lexington Branch	66.03
Shelby Cut Off	8.51
Lexington & Eastern Railroad	195.53
Louisville & Atlantic Division	100.15
Sturgeon Creek Branch	2.96
Louisville Harrods Creek & Westport Branch	3.46
Louisville & Nashville—Main Line	139.90
Madisonville Hartford & Eastern Railroad (Operated jointly with L. H. & St. L.) ½ of	55.48

Memphis Line	46.46
Middlesborough Railroad	6.03
Stoney Fork Branch	6.08
Morganfield & Atlanta Railroad	25.35
Newsport & Cincinnati Bridge	0.54
Owensboro & Nashville Division	83.46
Shelby Branch	18.53
Springfield Branch	20.07
Wasioto & Black Mountain Railroad	73.13
Carried Forward	1,755.68

864

Brought Forward	1,775.68

Terminal Roads—Taxes Paid by Lessor.

Chesapeake & Ohio Railway; Track at Lexington	0.20
Cincinnati & Covington Elevated Railroad Bridge and Terminal	1.24
Lexington Union Railway Co.; Track at Lexington	0.22
Louisville & Interurban Railway	7.70
Louisville Henderson & St. Louis Railway; Track at Owensboro	0.26
Providence Coal Co.; Track at Providence	0.30
Central Transfer Railway & Storage Co.; Track at Louisville	0.654
Straight Creek Coal & Coke Co.; Straight Creek to Blanche	3.89
Total	1,770.144

Total Length of Railroad	4,898.839 Miles	
Total Value of Rolling Stock		$13,069,505.00
Value per mile Rolling Stock	$2,667.878	
Length of Railroad operated in the State of Kentucky	1,770.144 Miles	
Value of Rolling Stock for the Length of Railroad operated in the State of Kentucky		$4,722,530.00

865 STATE OF KENTUCKY,
Jefferson County:

W. L. Mapother says that he is First Vice President of the Louisville & Nashville Railroad Company, and the Chief Officer thereof now in the State of Kentucky, and that he believes the statements of the foregoing Return are true.

Signed W. L. MAPOTHER.

Subscribed and sworn to before me by W. L. Mapother, this 25th day of July, 1913.

[SEAL.] Signed G. W. B. OLMSTEAD,
Notary Public.

My commission expires January 24, 1914.

866 *Census Report.*

Defendants read in evidence the following extracts from Bulletin No. 21, 1905, Department of Commerce and Labor, Bureau of Census, Commercial Valuation of Railway Operating Property in the United States, 1904, Page 7 of Article by Prof. Henry C. Adams:

"The value of terminal properties, ferries, bridges, and the like used but not owned by railway corporations is included in the valuation of railway property already submitted. On the other hand property owned by railway corporations but not used in the business of transportation is excluded from the value of railway property as given above, even though such property is the source of a net income to the Railway. Both the inclusion and the exclusion result, however, from the method adopted and not from a scrutiny of the property."

From "Table 1, p. 8, showing the Commercial value of Railway Property Devoted to Transportation in the several States and Territories as of June 30, 1904,"

Heading, "Commercial value of Railway Operating Property as of June 30, 1904" of the several States, for Kentucky $155,772,000—Percent of Total for United States, 1.385—Rank of State 23—number of miles of single track, 3,250— average value per mile $47,900."

From page 9,

"The meaning of the figures submitted becomes clear when it is remembered that this valuation was made for the Bureau of Census, as one step in the determination of the wealth of the nation. It stands for that portion of the wealth employed in the business of transportation by rail. This being the case, those to whom the task of making this valuation was assigned were obliged to adopt a method

867 that would disclose as nearly as possible the true cash or market value of the property. No other conception of value would be warranted, when the object of the valuation is to determine the current wealth of the nation."

Also from page 9, under "Method of Valuation," and under heading "Income to be capitalized," the following:

"Inasmuch as the value to be obtained is the commercial value of property used in transportation by rail, it is evident that the income to be capitalized should be confined to operating income. Fortunately, this phrase has a definite meaning in railway accounting, and the deviations in practice from the established rules respecting operating income are not sufficiently numerous to cast reasonable doubt upon the gross figures annually reported to the Interstate Commerce Commission."

"It should be especially borne in mind that the income of railway corporations from investments in property not used in the business of transportation should be excluded from the sum to be capitalized. The reason for this is that to include such income would result in *in* a duplication of value when the Bureau of the Census combines the values here submitted with an appraisal of general property, for the purpose of arriving at the aggregate wealth of the nation. A hotel, for example, may be owned by a railway corporation and the income arising from its management may be included in the railway's income account. But inasmuch as the hotel is subject to local appraisal as distinct from railway appraisal by the laws of most of the states, the income arising therefrom cannot be taken into consideration in the valuation of railway property."

Also from page 12, under "Distribution of Value," the following:

"The use to be made by the Bureau of the Census of the valuation of railway property here submitted requires the distribution of this value to the several states and territories. This distribution must, of course, be made by arbitrary rule, and a great deal
868 depends upon the nature of the rule adopted. An exhaustive discussion of this general question will be found—the third paper appearing in the Supplement, contributed by Professor Meyer. By referring to this discussion it will be observed that ten different methods are suggested for the assignment of railway values to the states. These are as follows:

1. Single-track mileage basis.
2. All-tracks mileage basis.
3. On the basis of the funded debt and other obligations.
4. On the basis of station population.
5. Car-mileage basis.
6. On the basis of the original cost of construction.
7. On the basis of the density of traffic.
8. The gross-earnings basis.
9. The net-earnings basis.
10. On the basis of the cost of reproduction.

An exhaustive study of these methods led to the conclusion that the gross-earnings basis would result in the most accurate assignment of the value of railway property possible.

Also from page 14, Table 2, as follows:

"Kentucky, Commercial, as of June 30, 1904.....	$155,772,000
Latest reported as assessed for purposes of taxation, Jan. 1, 1904	77,658,040
Ratio of assessed to commercial (per cent).....	49.9

869 *Report of Board of Equalization*, 1904.

Defendants also read the following extracts from the proceedings of the State Board of Equalization of the State of Kentucky, Session 1904, Page 12, towit:

"This Board has previously called attention to the oversight in the

law creating the said board, whereby Section 7 was allowed to remain a part of the statute. We desire again to emphasize the fact that this section is rendered absolutely void, both by the Constitution which allows no discretion to the lawmakers in the matter but makes it mandatory that all property shall be listed at its fair cash value, and by other sections of the Revenue Law assessors are not only authorized to accept lists of property at other than a fair cash value, but must, before entering upon the discharge of their duties take the following oath; "I do swear that I will administer to every person listing property of every description the oath prescribed by law and fix the value of all property to be listed by me at its fair cash value estimated at the price it would bring at a fair voluntary sale."

We again urge upon all assessors the duty of reading carefully all the provisions of the new Revenue Law and familiarizing themselves with their duties under it. * * * (p. 13). When it happens, as it often does, that a County Board of Supervisors allows a rich section of the county to list its property at less than it should be, there is nothing left for this board except to raise the whole county * * * (p. 14). We desire also to call attention to the injustice practiced in some of the counties of the State of listing the lands and lots sold during the year at a valuation out of any proportion to the valuation fixed upon other lands and lots in the same county.

870 The price which real estate in a community brings upon the market affords a very fine index to the correct valuation of property in that locality, and should greatly aid the assessor and supervisors in arriving at a fair valuation, not only of the property transferred, but of other property similarly situated. It is manifestly unjust, however, to require the owner of real estate which has been sold during the year to list it at its full cash value and at the same time allow his neighbors with property equally valuable to escape with valuations grossly out of proportion."

And from said proceedings Page 81 as follows, towit:

"Grand total of all property as assessed for taxation $630,795,464.00;

Grand total of all property equalized for taxation $636,744,205;

Total amount for taxation $3,183,721.02."

871 *Report of Auditor*, 1904-1905.

Defendants also read in evidence the following extracts from the report of the Auditor of Kentucky for 1904-1905, Page 4, towit:

"If the burden of taxation is not equal under the present law it is not in my opinion so much the fault of the law as it is the fault of those charged with the execution of the law and those whose patriotic duty it is to obey its commands.

If those charged with the assessments of property were as careful in listing it as their duties require them to be there would — less property escape taxation than does, and greater equality and fairer valuations would obtain."

L. & N. Report to Stockholders 1911

Louisville, Ky., October 4, 1911.

To the Stockholders of the Louisville & Nashville Railroad Company:

The Board of Directors of your Company respectfully submits the following report for the fiscal year ended June 30, 1911:

MILEAGE.

I. Lines Owned and Operated.

			MILES
(1) Owned—Property deeded		3,507.75	
(2) Operated but not owned—			
(a) Operated as owner of entire Capital Stock	544.45		
(b) Operated under lease	118.97		
(c) Operated for account of owners	221.88		
(d) Operated under trackage arrangements	216.53		
(3) Owned, leased to N., C. & St. L. R'y—operated under trackage arrangements		1,101.83	
(4) Owner of entire Capital Stock, property operated separately—operated by this Company under trackage arrangements		5.46	
Total operated		6.46	
Average mileage operated during the year, 4,598.39.			4,621.50

BONDED DEBT.

Bonded Debt, June 30, 1910, total issue			$155,344,500.00
BONDS DRAWN FOR SINKING FUNDS—			
REDEEMED—			
Evansville, Henderson & Nashville Division Gold	$106,000.00		
General Mortgage Gold	463,000.00		
Pensacola & Atlantic Railroad First Mortgage Gold	80,000.00		
Pensacola Division First Mortgage Gold	19,000.00		
		$668,000.00	
UNREDEEMED (Not Presented for Payment)—			
General Mortgage	38,000.00		
Evansville, Henderson & Nashville Division Gold	4,000.00		
Pensacola & Atlantic Railroad First Mortgage Gold	2,000.00		
Pensacola Division First Mortgage Gold	1,000.00		
		45,000.00	
			$713,000.00
BONDS ISSUED—			
Unified Fifty-year 4 per cent Gold		596,000.00	
Atlanta, Knoxville & Cincinnati Division 4 per cent Gold		84,000.00	
			680,000.00
			33,000.00
DEDUCT—			
Henderson Bridge Company First Mortgage Bond, drawn for Sinking Fund—Unredeemed June 30, 1910, redeemed during this fiscal year and paid into Sinking Fund			1.000.00

	8,857,568.92
South & North Alabama R. R. Company surplus (included in above)	302,236.21
Net Income carried to Profit and Loss Account	$8,555,332.71

The balance to credit of Profit and Loss Account amounts to $31,513,953.26.
For details see Table No. II, page 19.

GROWTH OF TRAFFIC.

The growth of traffic for the past ten years is shown by the following table:

YEARS.	Average Miles Operated.	Operating Revenues.	Operating Expenses.	Net Operating Revenues.	Operating Revenues Per Mile.	Operating Expenses Per Mile.	Net Operating Revenues Per Mile.	Percentage of Expenses to Operating Revenues.
1901–1902	3,326.75	$30,712,257.37	$20,902,437.84	$9,809,819.53	$9,231.91	$6,283.14	$2,948.77	68.06
1902–1903	3,438.93	35,449,377.84	23,970,812.44	11,478,565.40	10,308.26	6,970.43	3,337.83	67.62
1903–1904	3,618.19	36,943,792.73	25,141,548.27	11,802,244.46	10,210 57	6,948.65	3,261.92	68.05
1904–1905	3,826.31	38,517,070.72	26,490,020.97	12,027,049.75	10,066.37	6,923.12	3,143.25	68.77
1905–1906	4,130.91	43,008,996.23	30,933,463.71	12,075,532.52	10,411.50	7,488.29	2,923.21	71.92
1906–1907	4,306.33	48,263,945.20	35,781,302.54	12,482,642.66	11,207.67	8,309.00	2,898.67	74.14
1907–1908	4,347.80	44,620,281.16	*33,594,291.05	11,025,990.11	10,262.72	7,726.73	2,535.99	75.29
1908–1909	4,393.11	45,425,891.45	*29,627,499.48	15,798,391.97	10,340.26	6,744.08	3,596.18	65.22
1909–1910	4,554.30	52,433,381.94	*34,985,578.78	17,447,803.16	11,512.94	7,681.88	3,831.06	66.72
1910–1911	4,598.39	53,993,740.78	*38,479,822 61	15,513,918.17	11,741.88	8,368.11	3,373.77	71.27

*Does not include Additions and Betterments heretofore included in Operating Expenses.

GENERAL RESULTS.

The General Results, as given in detail in Table No. I, page 18, are here summarized.

Operating Revenues	$53,993,740.78	
Less Operating Expenses, 71.27 per cent	38,479,822.61	
Net Operating Revenues, 28.73 per cent		$15,513,918.17
Taxes		1,938,089.20
		13,575,828.97
OTHER INCOME—		
From Rents	657,586.97	
From Investments	911,182.54	
From Interest	410,909.49	
From Outside Operations	40,403.41	
		2,020,082.41
Total Income		15,595,911.38
DEDUCTIONS FROM INCOME—		
Interest on Bonded Debt	6,059,891.06	
Rents	445,246.90	
Sinking Funds	233,204.50	
		6,738,342.46

INCOME FROM INVESTMENTS—				
Chicago, Indianapolis & Louisville Railway Stock		236,830.12		
Nashville, Chattanooga & St. Louis Railway Stock		430,656.00		
Charleston Terminal Company Bonds		12,000.00		
Louisville Property Company Bond		64,000.00		
Wholesale Merchants Warehouse Company Bonds		19,900.00		
Cairo & Thebes Railroad Company Bonds		20,320.00		
Lexington & Eastern Railway Company Bonds		63,444.91		
Sundry Bonds and Stocks		64,031.51		
			911,182.54	
INTEREST FROM VARIOUS SOURCES (NET)			410,909.49	
				1,979,679.00
				15,595,911.38
FROM WHICH DEDUCT—				
Charges against Income—				
Interest on bonded debt		6,059,891.06		
Rents paid for lease of roads—				
Additions and Betterments on Nashville & Decatur Railroad	$18,632.55			
Guaranteed dividend on Nashville & Decatur Railroad stock	118,061.25			
		$136,693.80		
Rents of other roads		37,511.59		
			174,205.39	
Rents for tracks, yards, and other facilities (net)		271,041.51		
			6,505,137.96	
Sinking Fund Charges—				
Direct payments for which no bonds are received		110,400.00		
Accrued premiums on bonds drawn for sinking funds		72,900.00		
Accrued interest on Company's bonds in sinking funds		49,904.50		
			233,204.50	
				6,738,342.46
				8,857,568.92
South & North Alabama Railroad Company surplus for year included in above				302,236.21
Net income transferred to the credit of Profit and Loss Account				$8,555,332.71

TABLE No. I.

INCOME ACCOUNT.

OPERATING INCOME—		
Rail Operations—		
Operating Revenues—		
Revenue from transportation	$53,607,978.22	
Revenue from operations other than transportation	385,762.56	
Total operating revenues		$53,993,740.78
Operating Expenses—		
Maintenance of way and structures	9,178,192.27	
Maintenance of equipment	9,490,759.30	
Traffic expenses	1,124,598.79	
Transportation expenses	17,588,595.03	
General expenses	1,097,677.22	
Total operating expenses 71.27 per cent		38,479,822.61
Net operating revenues 28.73 per cent		15,513,918.17
Outside operations—		
Revenues	388,972.82	
Expenses	348,569.41	
Surplus		40,403.41
Total net revenues		15,554,321.58
Taxes		1,938,089.20
Operating income		13,616,232.38

L. & N. Report to Stockholders 1912.

Louisville, Ky., October 2, 1912.

To the Stockholders of the Louisville & Nashville Railroad Company:

The Board of Directors of your Company respectfully submits the following report for the fiscal year ended June 30, 1912:

MILEAGE.

I. Lines Owned and Operated.

			MILES
(1) Owned—Property deeded		3,538.63	
(2) Operated but not owned—			
(a) Operated as owner of entire Capital Stock	632.05		
(b) Operated under lease	118.97		
(c) Operated for account of owners	221.88		
(d) Operated under trackage arrangements	217.04		
		1,189.94	
(3) Owned, leased to N., C. & St. L. R'y—operated under trackage arrangements		5.46	
(4) Owner of entire Capital Stock, property operated separately—operated by this Company under trackage arrangements		6.46	
Total operated			4,740.49

Average mileage operated during the year, 4,709.93.

II. Lines Operated Under Their Separate Organizations in which this

For details see Table No. II, page 19.

Bonded Debt, June 30, 1912, total issue. (See Balance Sheet, Table III)		155,195,500.00
Less—		
Bonds Owned (see page 24).		
In Treasury	11,133,000.00	
Deposited in Trusts as Collateral	7,079,000.00	
Held in Sinking Funds	905,000.00	
		19,117,000.00
Total Outstanding Bonded Debt in hands of public, June 30, 1912		136,078,500.00
Total Outstanding Bonded Debt in hands of public, June 30, 1911		136,883,500.00
Decrease in Bonds outstanding in hands of public		805,000.00
Accounted for as follows—		
Bonds drawn for Sinking Funds, including Redeemed and Unredeemed Bonds	749,000.00	
Bonds purchased for Sinking Funds	56,000.00	
Bond purchased, held in Treasury	1,000.00	
	806,000.00	
Less—		
Bond withdrawn from Treasury and canceled for Sinking Fund	1,000.00	
Decrease as shown above		805,000.00

BONDED DEBT.

Bonded Debt, June 30, 1911, total issue				$155,312,500.00
BONDS DRAWN FOR SINKING FUNDS—				
REDEEMED—				
Evansville, Henderson & Nashville Division Gold	$108,000.00			
General Mortgage Gold	482,000.00			
Pensacola & Atlantic Railroad First Mortgage Gold	83,000.00			
Pensacola Division First Mortgage Gold	25,000.00			
		$698,000.00		
UNREDEEMED (Not Presented for Payment)—				
Evansville, Henderson & Nashville Division Gold	2,000.00			
General Mortgage	45,000.00			
Pensacola & Atlantic Railroad First Mortgage Gold	4,000.00			
		51,000.00		
			$749,000.00	
BONDS ISSUED—				
Unified Fifty-year 4 per cent Gold		183,000.00		
Atlanta, Knoxville & Cincinnati Division 4 per cent Gold		449,000.00		
			632,000.00	
Net decrease from last year				117,000.00

Less— South & North Alabama R. R. Company surplus (included in above).....	639,581.15
Net Income carried to Profit and Loss Account.....	$9,560,771.88

The balance to credit of Profit and Loss Account amounts to $37,419,876.39.
For details see Table No. II, page 19.

GROWTH OF TRAFFIC.

The growth of traffic for the past ten years is shown by the following table:

YEARS.	Average Miles Operated.	Operating Revenues.	Operating Expenses.	Net Operating Revenues.	Operating Revenues Per Mile.	Operating Expenses Per Mile.	Net Operating Revenues Per Mile.	Percentage of Expenses to Operating Revenues.
1902-1903	3,438.93	$35,449,377.84	$23,970,812.44	$11,478,565.40	$10,308.26	$6,970.43	$3,337.83	67.62
1903-1904	3,618.19	36,943,792.73	25,141,548.27	11,802,244.46	10,210.57	6,948.65	3,261.92	68.05
1904-1905	3,826.31	38,517,070.72	26,490,020.97	12,027,049.75	10,066.37	6,923.12	3,143.25	68.77
1905-1906	4,130.91	43,008,996.23	30,933,463.71	12,075,532.52	10,411.50	7,488.29	2,923.21	71.92
1906-1907	4,306.33	48,263,945.20	35,781,302.54	12,482,642.66	11,207.67	8,309.00	2,898.67	74.14
1907-1908	4,347.80	44,620,281.16	*33,594,291.05	11,025,990.11	10,262.72	7,726.73	2,535.99	75.29
1908-1909	4,393.11	45,425,891.45	*29,627,499.48	15,798,391.97	10,340.26	6,744 08	3,596.18	65.22
1909-1910	4,554.30	52,433,381.94	*34,985,578.78	17,447,803.16	11,512.94	7,681.88	3,831.06	66.72
1910-1911	4,598.39	53,993,740.78	*38,479,822.61	15,513,918.17	11,741.88	8,368.11	3,373.77	71.27
1911-1912	4,709.93	56,211,788.30	*39,626,327.44	16,585,460.86	11,934.74	8,413.36	3,521.38	70.49

*Does not include Additions and Betterments heretofore included in Operating Expenses.

GENERAL RESULTS.

The General Results, as given in detail in Table No. I, page 18, are here summarized.

Operating Revenues	$56,211,788.30	
Less Operating Expenses, 70.49 per cent	39,626,327.44	
Net Operating Revenues, 29.51 per cent		$16,585,460.86
Taxes		1,854,684.40
		14,730,776.46
OTHER INCOME—		
From Rents	780,882.03	
From Investments	951,201.55	
From Interest	704,869.70	
	2,436,953.28	
Outside Operations—Deficit	8,178.92	2,428,774.36
Total Income		17,159,550.82
DEDUCTIONS FROM INCOME—		
Interest on Bonded Debt	6,328,640.67	
Rents	380,507.79	
Sinking Funds	250,049.33	6,959,197.79

TABLE No. 1.

INCOME ACCOUNT.

June 30, 1911.				
	OPERATING INCOME—			
	Rail Operations—			
	Operating Revenues—			
$53,607,978.22	Revenue from transportation		$55,780,590.31	
385,762.56	Revenue from operations other than transportation		431,197.99	
53,993,740.78	Total operating revenues			$56,211,788.30
	Operating Expenses—			
9,178,192.27	Maintenance of way and structures		8,828,754.68	
9,490,759.30	Maintenance of equipment		10,071,303.59	
1,124,598.79	Traffic expenses		1,178,108.12	
17,588,595.03	Transportation expenses		18,408,196.99	
1,097,677.22	General expenses		1,139,964.06	
38,479,822.61	Total operating expenses 70.49 per cent			39,626,327.44
15,513,918.17	Net operating revenues 29.51 per cent			16,585,460.86
	Outside operations—			
388,972.82	Revenues		385,737.92	
348,569.41	Expenses		393,916.84	
*40,403.41	Deficit			8,178.92
15,554,321.58	Total net revenues			16,577,281.94
1,938,089.20	Taxes			1,854,684.40
13,616,232.38	Operating income			14,722,597.54
	INCOME FROM RENTS—			
12,039.70	Clarksville & Princeton Branch	$12,039.70		
206,506.20	Paducah & Memphis Division	206,506.20		
360,080.37	Equipment	498,673.74		
78,960.70	Various sources	63,662.39		
657,586.97			780,882.03	
	INCOME FROM INVESTMENTS—			

872 *Tax Commission Report*, 1908.

Defendants also read the following extract from the report of the Tax Commissioners appointed December 21, 1908, towit:

The Commission summing up the complaint of and defects in the system of taxation in Kentucky, recite (p. 3):

"Second. It unjustly places an undue portion of the public burden on some classes of property, and especially upon real estate, while permitting other classes of property entirely to escape taxation."

Also from p. 19 under heading "Burden Falls on Farmer", the following:

"An analysis of the State assessments reveals the fact that 53 per cent of the property listed for taxation is in the agricultural parts of the State. Farm lands alone constitute 45 per cent, of the total assessment. Farms, livestock, farming implements and like property constitute over 7 per cent. of the total, and if we add to those two items even a small percentage of all other personalty assessed in rural counties, much of which must belong to the farmers, we get this startling result: That under our uniform ad valorem system in practice, at least 53 per cent. of the direct tax for State purposes collected from assessments comes from farm property, while only about 6 per cent. comes from money, stocks, bonds, etc., in the hands of other people. In this respect the experience of Kentucky is not exceptional. Every State has met with a similar result in attempting to collect a heavy ad valorem direct tax on this class of property."

Also from p. 22 under the heading "Fails to Produce Revenue", the following:

"Men will not submit to a tax rate which they consider unfair. When the tax rate becomes so high that under-valuation begins, an increase in the tax rate does not proportionately increase the
873 revenue.

Our present tax laws in Kentucky are fairly well enforced. We have succeeded much better than many States in the matter of assessments, but we have not devised, nor has any State been able to devise, any plan that has been able to bring out the millions of dollars of personal property for assessment under the general property tax system. To reach this property it is necessary to adopt different methods, which are not possible under our Constitution as it now reads."

(Here follows L. and N. report to stockholders, 1911, marked pages 874 to 881.)

882 Defendant also introduced in evidence the Annual Report of the Louisville & Nashville Railroad Company to the Railroad Commission of Kentucky for the year ending June 30, 1912, a very voluminous report exceeding one hundred and fifty pages in length without calling attention to any special part thereof, but at the request of the defendant's counsel the following extracts from same are included herein as being the only part of said report deemed material to this inquiry, towit:

(Here follows recapitulation of funded debt marked pages 883 and 884.)

KIND OF BOND OR OBLIGATION.	TOTAL PAR VALUE OUTSTANDING.	TOTAL PAR RESE	
		IN TREASURY.	PLE COL
Mortgage Bonds,	1 43 536 000	10 678 000	7 0
Collateral Trust Bonds,	11 042 500	4 [illegible] 00	
Plain Bonds, Debentures and Notes,	24 657		
Income Bonds,			
Miscellaneous Funded Obligations,	617 000		
Equipment Trust Obligations,			
Receipts Outstanding for Funded Debt,			
TOTAL,	155 220 157	11 133 000	7 0

PURPOSE OF THE ISSUE.	TOTAL PAR VALUE ISSUED DURING THE YEAR.	CAS AM DUR
Issued for Cash:		
Issued for Construction of New Properties:		
Issued for Additions and Betterments:		
Issued for Purchase of Railway or Other Property		
Issued for Acquisition of Securities:		
Issued for Refundment of Securities:		
Issued for Reorganization:		
TOTAL,		

...ATION OF FUNDED DEBT.

...LUE HELD BY ...NDENT.		TOTAL PAR VALUE NOT HELD BY RESPONDENT.	INTEREST.		
			AMOUNT ACCRUED DURING THE YEAR		AMOUNT PAID DURING THE YEAR
...GED AS ...TERAL.	IN SINKING OR OTHER FUNDS.		Charged to Income.	Charged to Construction.	
9000	905000	124 874000	5515270 00		5525572 50
		10 00	471170 00		470500 00
		24657			
		617000	3085000		3127500
9000	905000	136103157	6017290 00		6027347 50

...REALIZED ON ...UNT ISSUED ...G THE YEAR	TOTAL PAR VALUE OUTSTANDING In hands of the Public	TOTAL CASH REALIZED.	REMARKS.
			* Bonds that were assumed by this Company are shown at Par Value in "Total Cash Realized"
	136103157	129252113	

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INCOME ACCOUNT.

[FOR COMPANIES MAKING OPERATING REPORTS.]

OPERATING INCOME:				
Rail Operations:				
Operating Revenues—Page 45,	562117830	*	*	*
Operating Expenses—Page 65 (or 65A),	396263744	*	*	*
NET OPERATING REVENUE,	*	165854086	*	*
NET OPERATING DEFICIT,	*	*	*	*
Outside Operations—Page 67, A:				
Revenues,	38573792	*	*	*
Expenses,	39391684	*	*	*
NET REVENUE FROM OUTSIDE OPERATIONS,	*	*	*	*
NET DEFICIT FROM OUTSIDE OPERATIONS,	*	817892	*	*
TOTAL NET REVENUE,	*	165772194	*	*
TOTAL NET DEFICIT,	*	*	*	*
Taxes Accrued—Page 81, A.	*	16946128	*	*
OPERATING INCOME,	*	*	14882	67166
OPERATING LOSS,	*	*	*	*

885 STATE OF KENTUCKY,
County of Jefferson, sct:

We, the undersigned, W. L. Mapother, first vice-president and Charles Hayden, comptroller, of Louisville & Nashville Railroad Company on our oath do severally say that the foregoing return has been prepared under our direction from the original books, papers and records of said company; that we have carefully examined the same and declare the same to be a complete and correct statement of the business and affairs of said company in respect to each and every matter and thing therein set forth; and we further say that no deductions were made before stating the operating revenues herein set forth except those shown in the foregoing accounts; and that the accounts and figures contained in the foregoing return embrace all of the financial operations of said company during the period for which said return is made, to the best of our knowledge, information and belief.

W. L. MAPOTHER,
1st Vice-President.
CHAS. HAYDEN, *Comptroller.*

Subscribed and sworn to before me this 30th day of September, A. D. 1912.
G. W. B. OLMSTEAD,
Notary Public, Jefferson Co., Ky.

My commission expires January 24, 1914.

886 *Operating Revenues, State of Kentucky.*

(For companies making operating reports.)

Account.	Intrastate revenues.	Interstate revenues assigned to State.	Total revenues.
I. Revenue from transportation:			
1. Freight revenue.....	3,559,093.80	12,308,598.36	15,867,692.16
2. Passenger revenue	2,126,053.28	2,149,353.12	4,275,406.40
3. Excess baggage "	33,493.71	30,273.82	63,767.53
4. Parlor & chair car revenue	294.25	3,202.95	3,497.20
5. Mail revenue	45,560.11	293,076.31	338,636.42
6. Express revenue	256,403.78	339,946.90	596,350.68
7. Milk revenue (on passenger trains)	25,183.35	5,841.87	31,025.22
8. Other passenger train revenue	765.47	1,751.07	2,516.54
Total passenger service train revenue (accounts 2 to 8)..	2,487,753.95	2,823,446.04	5,311,199.99
9. Switching revenue (see instructions, p. 44).....	20,013.95	129,539.80	149,553.75
10. Special service, train revenue	7,977.90	2,766.79	10,744.69
11. Miscellaneous transportation revenue	196.16	239.76	436.37
Total revenue from transportation (accounts 1 to 11)....	6,075,036.21	15,264,590.75	21,339,626.96

II. Revenue from operations other than transportation:

12. Station and train privileges	3,970.47	3,690.84	7,661.31
13. Parcel room receipts	.....	.....	.....
14. Storage—freight	6,481.08	8,691.27	15,172.35
15. Storage—baggage	1.159.48	1,121.32	2,280.80
16. Car service	22,772.42	34,255.33	57.027.75
17. Telephone & telegraph service	670.70	1,130.92	1,801.62
18. Rent of building & other property	7,718.11	.....	7,718.11
19. Miscellaneous	5,433.28	1,089.51	6,522.79
Total revenue from operations other than transportation.	48,205.54	49.979.19	98,184.73
20. Joint facilities revenue—Dr.	**1,067.15	.....	*1,067.15
21. Joint facilities revenue—Cr.	1.451.41	15,460.03	16,911.44
Total operationg revenues—State	6,123,626.01	15,330,029.97	21,453,655.98
Total operating revenues—entire line.	.....	.....	56,211.788.30

* Deficit.

887 It is also agreed that the Board had before it the report made by the plaintiff as of June 30, 1912 to the Auditor of Public Accounts, as required by the Kentucky Statutes for the purpose of enabling the Board to make an assessment of plaintiff's franchise for the year 1913, as follows:

(Here follows report marked pages 888 to 899.)

890 (A) Included in these bonds are bonds on a tract of land and improvements in St. Louis, Mo., amounting to $617,000.00. It is submitted that this mortgage debt, not being on any part of the company's Railroad, should not be considered for the purpose of arriving at the value of the franchise of the Railroad Company.

Included in the value of stocks and bonds are the following values representing stocks owned by the Louisville & Nashville Railroad Co. in corporations which are separately taxed in the State of Kentucky, and which pay taxes on all of their property of every kind in the State of Kentucky and which should, therefore, not be included in arriving at any calculation or estimate for the purpose of arriving at the value of the franchise of the Louisville & Nashville Railroad Co., for taxation in the State of Kentucky.

Frankfort & Cincinnati Railway	$489,719.81
Wasioto & Black Mountain Railroad	2,765,401.61
Elkton & Guthrie Railroad	15,175.00
Lexington & Eastern Railway	6,991,145.35
Kentucky Public Elevator Company	37,439.50
Colossal Cavern Company	30,163.17
Chicago, Indianapolis & Louisville Railway	6,008,533.62
Nashville, Chattanooga & St. Louis Railway	6,597,525.25
Paducah and Memphis Division	4,130,376.03
Morganfield & Atlantic Railroad	498,461.04
Kentucky Highlands Railroad	583,171.74
Central Transfer Railway & Storage Company	11,354.65
Madisonville, Hartford & Eastern Railroad	1,817,749.60
Louisville, Henderson & St. Louis Railway	519,788.73
Lexington Union Station Company	25,000.00
Clarksville & Princeton Branch—	
(That part leased to the Illinois Central Rd.)	240,794.25
Total	$30,761,799.35

(B) See statement attached.

(C) Included in this interest on bonded debt is $30,850.00 interest on mortgage bonds on the real property in St. Louis, Mo., above referred to, which it is submitted should not be regarded as a part of the interest on bonded debt of the Railroad Company for the purposes of arriving at the value of its franchise as a railroad company.

Included in the interest on bonded debt is also the interest on bonds representing stock ownership in companies which are separately taxed in the State of Kentucky, as set forth in Note "A", and it is submitted that this interest should not be regarded as a part of the interest on bonded debt of the Railroad Company for the purpose of arriving at the value of the Railroad Company's franchise for taxation.

(D) Included in the amount of "Net Income", $5,447,558.06 is Income from property separately taxed in the State of Kentucky,

which should not again be taxed against the Louisville & Nashville Railroad Co.

Included in "Miscellaneous Income"—	
Rent of Paducah & Memphis Div.	$206,506.20
Rent of Clarksville & Princeton Branch— (that part leased to Illinois Central Rd.)	12,039.70
	$218,545.90
Included in "Investments"—	
Dividends on stocks of Ky. Public Elevator Co.	1,680.00
Chicago, Indianapolis & Louisville Ry.	236,830.12
Nashv., Chattanooga & St. Louis Ry.	430,656.00
Central Transfer Ry. & Storage Co.	1,000.00
891 Lexington Union Sta. Co.	1,000.00
Lexington & Eastern Ry. Co.	70,953.33
	$742,119.45
Results from Operation of—	
Morganfield & Atlanta Rd.	31,828.73
Madisonville, Hartford & Eastern Rd. (Deficit)	43,393.38
Deficit	$11,564.65
Total Deductions	$949,100.70

Under Section 4085 Kentucky Statutes, this Company should not be taxed in any form on account of its ownership of the stock in the companies referred to, and therefore the dividends or returns from that stock ownership should not be considered as a part of the income of this company for the purpose of taxation. Indeed no part of this income has any necessary or proper connection in any manner with the value of the franchise of the Railroad Company, and throws no light upon that value from the standpoint of earning capacity, or otherwise. Any private individual, without any franchise whatever, could own these securities and derive exactly the same income therefrom. Of course full taxes are paid on the properties represented by these various securities where the properties are situated. In general it is submitted that for the purpose of valuing the franchise of the company as a railroad company, the only elements or income to be looked to are the earnings from the road operated which are available to the railroad company's stockholders and the rents and profits from the roads owned, leased or controlled which are so available.

(E) In giving the amounts of Stocks and Bonds located outside of the State of Kentucky, the amounts of all stocks and bonds owned by the Company or corporations incorporated in States other than Kentucky have been stated.

NOTE.—The operations of Henderson and Newport & Cincinnati Bridges are included in report of gross earnings, operating expenses, etc., on opposite page.

Report of the Louisville and Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30th, 1912, for Assessment of Franchise.

Detail of Item "Miscellaneous Income," Marked "B."

Rent, Clarksville & Princeton Division	$12,039.70	
Rent, Paducah and Memphis Division	206,506.20	
Rent, Equipment	783,439.03	
Rent, Outside Property	53,615.62	
Interest, General	704,869.70	
		$1,760,470.25

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Detail of Item "Income from Investments," Marked "C."

The following statements show the stocks and bonds on which this item of Income accrues; par value of each; the rate of Income; amount of Income or Dividends received, and ledger valuation:

Stocks Owned.

A.—Railway Stocks.

Name.	Total par value.	Rate.	Income or dividend received.	Valuation.
Atlanta & West Point Rd. Co.	$110,650.00	6%	$6,639.00	$149,377.50
Augusta Belt Railway	32,500.00			32,275.67
Augusta & Summerville Rd.	25,000.00			9,527.50
Augusta Union Station Co.	12,500.00		25.00	625.00
Bay Minnette & Ft. Morgan Rd.	50,000.00			5.00
Central Tr. Ry. & Storage Co.	25,000.00	4%	1,000.00	11,354.65
Chi., Ind. & Lou. Ry. Pref.	1,936,700.00	4%	77,468.00	6,008,533.62
Chi., Ind. & Lou. Ry., Com.	4,903,450.00	3¼%	159,362.12	
Cinti. Inter-Term'l Rd. Pref.	140,500.00		5,300.00	140,500.00
Elkton & Guthrie Rd.	17,275.00			15,175.00
Frankfort & Cincinnati Ry.	40,000.00			201,323.58
Goodlettsville & Greenbrier Rd.	10,000.00			10.00
Lewisburg & Northern Rd. Co.	100,000.00			10.00
Lexington & Eastern Ry. Co.	500,000.00			915,253.00
Lexington Union Sta. Co. Pref.	25,000.00		1,000.00	24,995.00
Lexington Union Sta. Co. Com.	5,000.00			5.00
Long Branch Coal Rd.	50,000.00			10.00
Louisville & Nashv. Term'l Co.	100,000.00			20.00
Lou., Hend. & St. L. Ry., Pref.	776,081.03			255,954.50

Lou., Hend. & St. L. Ry., Com.	1,631,385.50			263,834.23
Madisonv., Hart. & East'n Rd.	50,000.00			10.00
Memphis Railroad Terminal Co.	10,000.00			10,000.00
Milledgeville Ry.	15,000.00			17,500.00
Missouri & Ill. Br. Belt Co.	13,000.00		5,000.00	13,000.00
Monroe Railroad	50,000.00			5.00
Morganfield & Atlanta Rd.	50,000.00			10.00
Nashville & Decatur Rd.	1,979,600.00			1,964,826.01
Nashv., Chatta. & St. L. Ry.	7,177,600.00	6%	430,656.00	6,597,525.25
New Orleans, Mob. & Chi. Pref.	216,600.00			21,620.03
New Orleans, Mob. & Chi. Rd. Com.	2,385,254.59			362,145.89
Owensboro & Nashv. Ry. Com.	1,156,524.99			308,330.25
Pine Mountain Rd.	10,000.00			10.00
South & North Ala. Rd., Pref.	2,000,000.00			2.50
South & North Ala. Rd., Com.	1,135,233.33			457.50
Terml. Rd. Assn. of St. Louis	205,800.00			10.00
Swan Creek Railway	50,000.00			10.00
Wasioto & Black Mtn. Rd.	50,000.00			10.00
Woodstock & Blocton Ry.	120,000.00	5%	6,000.00	120,348.47
Harriman, Knoxv. & Eastn. Ry.	10,000.00			10.00
Sundry Other Stocks	8,300.00			4,160.08
Total	$27,183,954.44		$692,450.12	$17,448,780.23

Report of the Louisville and Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30th, 1912, for Assessment of Franchise.

B.—Other Stocks.

Name.	Total par value.	Rate.	Income or dividend received.	Valuation.
Buck Creek Cotton Mills, Pref.	$30,000.00			30,066.13
Atlantic Compress Co.	25,900.00			25,900.00
Colossal Cavern Co.	25,000.00			10.00
Gulf Transit Co.	82,300.00			10.00
Ky. Public Elevator Co., Com.	37,300.00	6%	$1,680.00	$37,439.50
Republic Iron & Steel Co. Pref.	54,800.00		3,338.00	57,379.90
Republic Iron & Steel Co. Com.	46,100.00			15,706.13
St. L. & Tenn. River Packet Co.	27,700.00		1,385.00	30,314.13
Southern Iron & Steel Co. Pref.	61,717.82			36,688.55
Tennessee River Packet Co.	25,200.00			10.00
Total	416,017.82		6,403.00	233,524.34
Grand Total, A and B	$27,599,972.26		$698,853.12	$17,682,304.57

Bonds Owned.

A.—Railway Bonds.

Name.	Total par value.	Rate.	Income or interest received.	Valuation.
Bay Minette & Ft. Morgan Rd., 1st Mortgage.	225,000.00			225,000.00
Cairo & Thebes Rd. Co., First 4%	1,688,000.00	4%	65,436.12	1,688,000.00
Carrollton & Worthv. Rd. 5%	92,000.00	5%	4,535.04	75,330.08
Charleston Terminal Co., 50 Year Gold	300,000.00	4%	12,000.00	276,800.00
Central Trans. Ry. & Storage Co.	10,000.00	5%	500.00	10,000.00
Elkton & Guthrie Rd. 1st Mtge	10,000.00	5%	500.00	10,000.00
Frankfort & Cinti. Ry., 1st Mtge., 4%	160,000.00	4%	6,400.00	160,000.00
Lexington & Eastern Ry., General	1,468,000.00	5%	70,953.33	1,175,282.83
Lexington & Eastern Ry., Debentures	363,372.50			171,659.00
Louisv. & Nashv. Terml. Co, 50 Year Gold	35,000.00	4%	2,466.97	35,000.00
Monroe Rd. Co., 1st Mtge., 4%	34,000.00	4%	1,360.00	46,741.47
Morganfield & Atlanta Rd., 1st Mtge., 4%	500,000.00	4%		500,000.00
Nashv., Chatt. & St. L. Ry. Issue	65,000.00	5 & 6%	3,260.00	65,000.00
Owensboro & Nashv. Ry. 1st Mtge	1,200,000.00			1,200,000.00
South & North Ala. Rd., Impt. 5%	1,920,000.00	5%	96,000.00	1,920,000.00
South & North Ala. Rd., Consol. 5%	2,708,000.00	5%	135,400.00	2,708,000.00
Woodstock & Blocton Ry., Certificate of Indebtedness	13,126.26	5%	656.31	13,126.26
L. & N.—Sou. Monon Collateral	31,000.00	4%	620.00	31,000.00
Total	$10,822,498.76		$400,087 77	$10,310,939.64

Report of the Louisville and Nashville Railroad Company to the Auditor of Public Accounts of Kentucky, as of June 30th, 1912, for Assessment of Franchise.

B.—Other Bonds.

Name.	Total par value.	Rate.	Income or interest received.	Valuation.
Jenifer Iron & Coal Co., 2nd Mtge.	$22,300.00	5%		$22,300.00
Muhlenberg Co., Ky., 5% Refunding	10,000.00	5%	500.00	10,000.00
National Coal & Iron Co.	58,000.00	5%	2,941.66	58,000.00
Sou. Iron & Steel Co. Debentures	72,000.00	6%		64,800.00
Sou. Iron & Steel Co., Refunding Bonds	36,678.54	4%		36,678.54
Sloss Iron & Steel Co., 1st Mortgage	43,000.00	6%	2,580.00	34,400.00
Wholesale Merchants' Warehouse Company	398,000.00	5%	19,900.00	398,000.00
Louisville Property Co., Gold Bond	1,600,000.00	4%	64,000.00	1,600,000.00
Sundry Other Bonds & Scrip	2,930.94		139.00	2,930.94
Total	$2,242,909.48		$90,060.66	$2,227,109.48
Grand Total, A and B	$13,065,408.24		$490,148.43	$12,538,049.12

Total Income from Stocks	$698,853.12	
Total Income from Bonds	490,148.43	
Grand Total Income from Investments, as shown by Report to Auditor		$1,189,001.55

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In order that a full financial report of the company may be before the State Board of Valuation and Assessment, there is also attached hereto, marked "Exhibit A" a copy of the General Balance Sheet of the Company, for the year ended June 30th, 1912.

(Signed)

CHAS. HAYDON,
Comptroller.

COMMONWEALTH OF KENTUCKY,
Jefferson County, ss:

This day personally appeared before the undersigned, a Notary Public in and for the State and County aforesaid, Charles Haydon, whose signature is attached hereto, and made oath that the statements made in the foregoing Report to the Auditor of Public Accounts of Kentucky are true and correct to the best of his knowledge and belief.

Given under my hand this 30th day of September, 1912.

(Signed)

GEO. B. OLMSTEAD,
Notary Public, Jefferson County, Kentucky.

895 EXHIBIT "A."

Louisville and Nashville Railroad Company—General Balance Sheet.

895	Assets.		
Property Investment:			
Road and Equipment—			
Investment to June 30, 1907—			
Road	$139,471,342.11		
Equipment	36,072,004.83		
		$175,543,346.94	
Investment since June 30, 1907—			
Road	14,885,951.95		
Equipment	7,739,706.05		
		22,625,658.00	
		198,169,004.94	
Reserve for Accrued Depreciation—Credit—			
Way and Structures, etc.	4,323,621.37		
Equipment	16,807,270.32		
		21,130,891.69	
			$177,038,113.25
Securities:			
Securities of Proprietary, Affiliated and Controlled Companies—			
Pledged:			
Stocks	250,728.48		
Funded Debt	1,200,000.00		
		1,450,728.48	

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Securities Issued or Assumed—Pledged—			
Funded Debt		7,079,000.00	
Securities of Proprietary, Affiliated and Controlled Companies—			
Unpledged—			
Stocks	2,380,589.48		
Funded Debt	885,000.00		
		3,265,589.48	
			11,795,317.96
Other Investments:			
Advances to Proprietary, Affiliated and Controlled Companies for Construction, Equipment, and Betterment		7,992,897.13	
Miscellaneous Investments—			
Physical Property	2,540,213.40		
Securities—Pledged	11,361,577.37		
Securities—Unpledged	6,399,612.17		
		20,301,402.94	
			28,294,300.07
Working Assets:			
Cash		11,085,960.66	
Securities Issued or Assumed—Held in Treasury—Funded Debt		11,133,000.00	
Marketable Securities—Funded Debt		8,561,981.03	
Loans and Bills Receivable		573,435.86	
Traffic and Car Service Balances, Due from Other Companies		484,921.32	
Net Balance Due from Agents and Conductors		1,024,260.16	
Miscellaneous Accounts Receivable		2,539,521.37	
Materials and Supplies		5,326,546.56	
Other Working Assets		151,916.67	
			40,881,543.63
Accrued Income Not Due:			
Unmatured Interest, Dividends and Rents Receivable			182,001.00

Deferred Debit Items:			
Advances:			
Temporary Advances to Proprietary, Affiliated and Controlled Companies	6,294,540.10		
Working Funds	40,705.27		
		6,335,245.37	
Special Deposits		862,135.89	
Cash and Securities in Sinking and Redemption Funds:			
Company Bonds	905,000.00		
Cash, etc.	55,539.85		
		960,539.85	
Other Deferred Debit Items		1,166,185.77	
			9,324,106.88
Carried forward			$267,515,382.79
896 Brought forward			$267,515,382.79
Contingent Assets:			
South & North Alabama Rd. Co. 5% Consolidated Gold Bonds outstanding, endorsed by Louisville & Nashville Rd. Co.		$7,292,000.00	
L. & N. Terminal Co. Fifty-Year 4% Gold Bonds outstanding, endorsed by L. & N. Rd. Co. and N. C. & St. L. Ry.		2,500,000.00	
Memphis Union Station Company 5% Collateral Gold Notes guaranteed by the L. & N. Rd. Co. and other interested Railroad Companies		2,100,000.00	
South & North Alabama Rd. Co. Interest Dividend on Preferred Stock		4,650,000.00	
			16,542,000.00
Total			$284,057,382.79

Stock:			
Capital Stock:			
Common Stock—			
Full shares outstanding		$59,917,200.00	
Practical shares outstanding		720.00	
Original stock and subsequent stock dividends unissued		82,080.00	
			$60,000,000.00
Mortgage, Bonded and Secured Debt:			
Funded Debt—			
Mortgage and Collateral Trust Bonds—			
Owned by Company	$19,117,000.00		
Outstanding in hands of Public	136,078,500.00		
		155,195,500.00	
Plain Bonds, Debentures and Notes		24,657.00	
			155,220,157.00
Working Liabilities:			
Traffic and Car Service Balances Due to Other Companies		272,570.81	
Audited Vouchers and Wages Unpaid		4,971,958.74	
Miscellaneous Accounts Payable		120,926.79	
Matured Interest, Dividends and Rents Unpaid		1,812,005.71	
Matured Mortgage, Bonded and Secured Debt, Unpaid		66,000.00	
Other Working Liabilities		279,949.26	
			7,523,411.31
Accrued Liabilities not Due:			
Unmatured Interest, Dividends and Rents Payable		2,883,096.37	
Taxes Accrued		943,184.15	
			3,826,280.52

Deferred Credit Items:		
Operating Reserves	637,285.51	
Other Deferred Credit Items	600,402.53	
		1,237,688.04
Appropriated Surplus:		
Additions to Property since June 30, 1907, through Income	2,281,569.53	
Reserves from Income or Surplus Invested in Sinking and Redemption Funds	324,875.67	
		2,606,445.20
Profit and Loss:		
Balance		37,101,400.72
Contingent Liabilities:		
South & North Alabama Rd. Co. 5% Consolidated Gold Bonds, Outstanding, endorsed by L. & N. Rd. Co.	7,292,000.00	
L. & N. Terminal Co. Fifty-year 4% Gold Bonds, Outstanding, endorsed by L. & N. Rd. Co. and N. C. & St. L. Ry.	2,500,000.00	
Memphis Union Station Co. 5% Collateral Gold Notes guaranteed by L. & N. Rd. Co. and other interested Railroad Companies	2,100,000.00	
South & North Alabama Rd. Co. Interest Dividend on Preferred Stock	4,650,000.00	
		16,542,000.00
Total		$284,057,382.79

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900 The foregoing was all of the evidence heard by the Court.

M. M. LOGAN,
Attorney General of Kentucky.
H. L. STONE,
HELM BRUCE,
W. A. COLSTON,
Att'ys for Pl'ff.

901 And on a day folowing, towit, on August 4th A. D. 1916, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
H. M. BOSWORTH et al., Defendants.

By consent of all parties it is ordered that the time within which plaintiff is ordered by the decree herein of June 13, 1916, to pay franchise taxes on a valuation of $2,909,292.60, in addition to what it has already paid on, be, and it is hereby extended to and including September 15, 1916.

902 And on the same day, towit, September 15, 1916, the following petition for appeal was filed herein:

District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
ROBERT L. GREENE, Auditor of Public Accounts; SHERMAN GOODPASTER, Treasurer, and James P. Lewis, Secretary of State, of the State of Kentucky, Individually and as Constituting the Board of Valuation and Assessment of the State of Kentucky; Robert L. Greene, Auditor of Public Accounts of the State of Kentucky; Thomas M. Jones, Assistant Auditor of Public Accounts of the State of Kentucky; M. M. Logan, Attorney General of the State of Kentucky; Charles H. Morris, First Assistant Attorney General of the State of Kentucky; O. S. Hogan, Second Assistant Attorney General of the State of Kentucky; D. O. Myatt, Third Assistant Attorney General of the State of Kentucky; Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, State of Kentucky, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky, Defendants.

Petition for Appeal.

The above named plaintiff, conceiving itself aggrieved by the decree made and entered on the 13th day of June, 1916, in the above

entitled cause, does hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which said order and decree were made,
903 duly authenticated, may be sent to the Supreme Court of the United States.

This 15th day of September, A. D. 1916.

HELM BRUCE,
WILLIAM A. COLSTON,
HENRY L. STONE,
Attorneys for Plaintiff.

The foregoing claim of appeal is allowed.

A. M. J. COCHRAN,
District Judge.

This September 15, 1916.

And on the same day, towit, September 15, 1916, the Assignment of Errors referred to in the foregoing petition for appeal was filed herein, same being in words and figures as follows, viz:

United States District Court for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
ROBERT L. GREENE, Auditor, et al., Defendants.

Assignment of Errors.

Plaintiff, Louisville & Nashville Railroad Company, assigns, and states the court in the trial and determination of the above entitled cause committed errors as follows, towit:

I.

In ordering plaintiff to pay franchise taxes to the State of Kentucky for the year 1913 on $2,909,292.60, or any sum, in
904 addition to the taxes which it had theretofore paid to the State on an assessment or value of $22,899,200, and in refusing to enjoin the members of the Board of Valuation and Assessment of Kentucky from apportioning an additional valuation or assessment of $2,909,292.60, or any sum, to the county, cities, towns, and taxing districts through which plaintiff's lines pass, or are operated, and in refusing to enjoin the Auditor from certifying any such additional values or proportions to county clerks after the final determination of such values or proportions.

II.

In holding that plaintiff should pay to the State of Kentucky, and to the sub-division thereof, franchise taxes for the year 1913 on an assessment of $25,808,493.60, or that it should pay such taxes upon any assessment in excess of $18,398,438.43, as shown by plaintiff's supplemental bill.

III.

In holding that plaintiff should pay the State of Kentucky, and to the sub-divisions thereof, franchise taxes for the year 1913 on an assessment of $25,808,493.60, or that it should pay such taxes upon any assessment in excess of $11,349,479.27, being the value which the court's opinion, filed August 31, 1915 (230 Fed. Rep. 191, 231), shows was the value of plaintiff's franchise assessable in Kentucky upon the basis of the total value of all plaintiff's property, tangible and intangible, wherever situated, as found and fixed by the Board of Valuation and Assessment, and by application of the princi-
905 ples settled by the court as to the correct method for determining the value of plaintiff's franchise assessable for taxation in Kentucky, proceeding upon the aforesaid basis of total values as fixed by the Board of Valuation and Assessment.

IV.

In refusing to enter a final decree in the form presented and tendered by plaintiff, which tender was made on the day the final decree was entered.

V.

In not holding that, under the Statutes of the State of Kentucky, the Board of Valuation and Assessment was and is authorized and empowered to value and assess only the franchise or intangible property of a railroad company, whose lines are partly within and partly without the State, for State and local taxation, and in not holding that said Board, in order to ascertain, value, and assess plaintiff's franchise or intangible property for such taxation in the State of Kentucky, should have deducted from the total value of plaintiff's capital stock or entire property, tangible and intangible, within and without the State, the value of plaintiff's tangible property, wherever situated, before apportioning to the State of Kentucky, on the mileage basis, its share of plaintiff's franchise or intangible property for such taxation.

VI.

In construing the Statutes of the State of Kentucky, particularly Section 4081 after it was amended by the Act of March 15, 1906, as authorizing and empowering said Board, in ascertaining, valu-
906 ing, and assessing the franchise or intangible property of a railroad company, whose lines are partly within and partly without the State of Kentucky, for State and local taxation in that

State, (1) to value the total capital stock or entire property, tangible and intangible, within and without the State; (2) to apportion to the State of Kentucky its share of such total value on a mileage basis; (3) to deduct from that share the assessed value of such company's tangible property in that State; and that such remainder constitutes the value of such company's franchise or intangible property, subject to taxation in the State of Kentucky, whereas, such remainder necessarily includes in part the value of such company's tangible property situated without the State and not taxable therein. The construction of said section of the Kentucky Statutes places the same beyond constitutional limits and renders its unenforcible.

VII.

In so construing Section 4081, Kentucky Statutes, as amended March 15, 1906, as to require said Board in valuing and assessing the franchise or intangible property of a railroad company, having lines within and without the State, for State and local taxation to first apportion, on the mileage basis, to the State of Kentucky its share of the total value of such company's capital stock or entire property, tangible and intangible, and to then deduct from such share so ascertained the assessed value of the tangible property of such company in that State, and that the remainder would constitute the value of such company's franchise or intangible property subject to State and local taxation in that State, the court's
907 holding in this respect is not only without warrant of law, but defeats the object of the statute, viz: to provide for the valuation and assessment by said Board of only that proportion of the total value of such company's franchise or intangible property, for State and local taxation in that State, which the length of its lines operated, owned, leased, or controlled in that state bears to the total length of its lines operated, owned, leased, or controlled in that state and elsewhere.

This construction by the court also subjects such railroad company to a second and double assessment of its tangible property, which by the Statutes of Kentucky is assessable exclusively and finally by the Railroad Commission (Sections 4096-4104), and, by limiting the deduction to the assessed value instead of the value of its tangible property, such construction operated to deprive such railroad company of the benefit of, and the right to rely upon the assessment of its tangible property for the same year's taxes made by the said Commission, the only body having Statutory power and authority to assess that class of its property, to the extent the assessment of its ta*b*gible property made and embraced by said Board in the share of the total value of such company's tangible and intangible property apportioned by said Board to Kentucky, exceeds the assessed value of the tangible property in that State made by said Commission, and to the same extent amounts to the imposition of double taxation, State and local, upon the same tangible property for the same year, an illegal and unjust result not intended by the Legislature of the State,

it must be presumed, under a fair and reasonable construction
908 of the statutes involved.

VIII.

In requiring the plaintiff, as a condition precedent to the granting of a temporary injunction against the defendants enjoining and restraining them from taking any steps toward the enforcement of the assessment complained of, to pay taxes, State and local, for the year 1913 on $11,000,000, or any sum, in addition to $11,899,200, on which plaintiff had paid such taxes prior to the institution of this suit.

IX.

The uncontradicted evidence in the record showed, as found by the court in its opinion delivered August 31, 1915, (230 Fed., 193-4), the said Board for the year 1913 fixed the value of plaintiff's capital stock or entire property, tangible and intangible, within and without the State of Kentucky, at $262,252,566, and that the Board fixed the value of all plaintiff's intangible property embraced in said entire value at $85,214,453; and the court erred in not decreeing that the share of the State of Kentucky in this latter value or plaintiff's franchise or intangible property in said State must be limited to not exceeding the mileage proportion thereof or 24.9601 per cent thereof, towit, $21,269,612, or $1,629,588 less than the aggregate sum of $22,899,200, on which plaintiff had already paid franchise taxes, State and local, for said year.

X.

In holding that in apportioning to the State of Kentucky its proper proportion of plaintiff's franchise for taxation, the Board of Valuation and Assessment was not required to apportion
909 to the State of Kentucky merely such part of the total sum to be apportioned as the length of the lines operated, owned, leased, or controlled by plaintiff in the State of Kentucky, bore, as of June 30, 1912, to the total length of lines, operated, owned, leased, or controlled in said State and elsewhere. But that after having made the apportionment on a mileage basis, as aforesaid, the Board then had the right to vary the result thus reached by adding to it or subtracting from it, on account of other considerations leading to the conclusion that the true value of the franchise was more or less than the amount reached by making the apportionment on a mileage basis, as aforesaid.

XI.

The court erred in holding that in considering whether or not the Board of Valuation and Assessment had adopted an improper method for ascertaining and fixing the value of plaintiff's franchise in Kentucky, one step in which process was first to ascertain the total

value of all plaintiff's property of every kind, everywhere, it appearing that the Board had adopted the process of capitalizing plaintiff's net income in order to ascertain such total value, the court could not review or revise either (1) the amount which the Board took as the actual net income to be capitalized, nor (2) the percentage at which the Board capitalized the said income, or (3) the amount which the Board deducted as the value of non-taxable property from the total value of plaintiff's property fixed by the Board.

910 XII.

The court erred in holding that in determining the total value of plaintiff's property, of which a part was to be apportioned to Kentucky in determining the value of plaintiff's franchise, the Board of Valuation and Assessment should include not only the value of plaintiff's interest in properties operated, owned, leased, or controlled, but also the entire value of property operated, owned, leased, or controlled by plaintiff, including interests therein owned by other persons than plaintiff.

Wherefore, plaintiff prays that the decree entered herein June 13, 1916, be reversed.

This September 15, 1916.

HELM BRUCE,
WILLIAM A. COLSTON,
HENRY L. STONE,
Attorney- for Plaintiff.

911 And on the same day, towit, September 15th, A. D. 1916, an order was made and entered herein, same being in words and figures as follows, towit;

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
ROBERT L. GREENE et al., Defendants.

This the 15th day of September, 1916, came the plaintiff, Louisville & Nashville Railroad Company, by its attorneys, and filed and presented to the court its petition praying for the allowance of an appeal, together with an assignment of errors intended to be urged by it, which is also filed; and praying that a transcript of the record and proceedings and papers upon which the order and decree herein were rendered, on June 13, 1916, duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the said appeal upon the plaintiff giving bond according to law, with surety, in the sum of $3000.00, which bond is to operate as a supersedeas.

Thereupon, the plaintiff, with the Royal Indemnity Company as surety, executed bond in the sum and as required by the foregoing order, which bond and surety are approved by the court.

A. M. J. COCHRAN, *Judge.*

912 And on the same day, to-wit, September 15th A. D. 1916, a supersedeas bond on appeal was filed herein, same being in words and figures as follows, viz;

District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
ROBERT L. GREENE et al., Defendants.

Supersedeas Bond on Appeal.

Know All Men by These Presents: That we, the appellant, Louisville & Nashville Railroad Company, as principal and the Royal Indemnity Company, as surety, are held and firmly bound unto the appellees, Robert L. Greene, and others, in the above styled case in the full and just sum of $3000.00 to be paid to the said appellees, their certain attorneys, successors or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns jointly and severally by these presents. Sealed with our seals and dated this 15th day of September, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately, towit, on June 13, 1916, at a District Court of the United States for the Eastern District of Kentucky in a suit pending in said court between the Louisville & Nashville
913 Railroad Company, plaintiff, and Robert L. Greene and others, defendants, an order and decree were rendered against said Louisville & Nashville Railroad Company and that company having been allowed an appeal to reverse said order and decree in the aforesaid suit, and a citation directed to the said Robert L. Greene and others, defendants herein, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 14th day of October next.

Now, the condition of the above obligation is such that if the said Louisville & Nashville Railroad Company shall prosecute said appeal to effect and answer all costs and damages if it fails to make said plea good, then the above obligation to remain in full force and virtue.

LOUISVILLE & NASHVILLE RAILROAD COMPANY.
By W. L. MAPOTHER,
First Vice President.
[SEAL.] ROYAL INDEMNITY COMPANY.
By HENRY G. BEDINGER, [SEAL.]
Attorney-in-Fact,
Surety.

Sealed and delivered in the presence of—
J. C. MICHAEL,
J. H. ELLIS,
Secretary.
Approved:
A. M. J. COCHRAN, *Judge.*

914 And on the same day, towit, September 15, 1916, a citation was issued herein, same being in words and figures as follows, viz:

United States of America: The President of the United States to Robert L. Greene, Auditor of Public Accounts, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, of the State of Kentucky, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky; Robert L. Greene, Auditor of Public Accounts of the State of Kentucky, Thomas M. Jones, Assistant Auditor of Public Accounts of the State of Kentucky, M. M. Logan, Attorney General of the State of Kentucky, Charles H. Morris, First Assistant Attorney General of the State of Kentucky, O. S. Hogan, Second Assistant Attorney General of the State of Kentucky, D. O. Myatt, Third Assistant Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, State of Kentucky, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the city of Washington within thirty (30) days from the date of this writ, pursuant to an appeal duly allowed by the District Court of the United States for the Eastern District of Kentucky and filed in the clerk's office of said court on the 15th day of September, A. D. 1916, in the cause wherein the Louisville & Nashville Railroad Company is appellant and you are appellees, to show cause why, if any, the decree rendered against said appellant as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 15th day of September, in the year of
915 our Lord one thousand nine hundred and sixteen, and of the Independence of the United States of America the one hundred and forty-first.

[SEAL.] A. M. J. COCHRAN,
United States District Judge.

Service of the foregoing citation is hereby accepted, this 26" day of September, 1916.

M. M. LOGAN,
JOHN L. RICH,
Attorneys for Appellee.

Filed September 26, 1916. J. W. Menzies, Clerk. By C. N. Wiard, D. C.

916 And on a day following, towit, on September 15th A. D. 1916, an order was made and entered herein, same being in words and figures as follows, viz:

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
ROBERT L. GREENE et al., Defendants.

An appeal with supersedeas having been this day allowed to the Supreme Court of the United States from the decree heretofore entered herein and it appearing to the court that the complainant would suffer irreparable damage if the temporary injunction heretofore granted were not continued pending such appeal, it is accordingly ordered adjudged and decreed that the said temporary injunction be and it is hereby continued in force until said appeal shall be heard and determined in the Supreme Court of the United States, or as that court may otherwise order and until the final order made after or pursuant to the judgment of the said Supreme Court.

A. M. J. COCHRAN, *Judge.*

917 And on a day following, towit, September 25, 1916, an agreement was filed herein, same being in words and figures as follows, viz:

United States District Court, Eastern District of Kentucky,
Frankfort.

In Equity.

LOUISVILLE & NASHVILLE R. R. Co., Plaintiff,
v.
ROBERT L. GREENE, Auditor, et al., Defendants.

Agreement Extending Time for Filing Record on Appeal.

It is agreed between counsel for plaintiff and defendants that plaintiff shall have until December 1, 1916, to file the record with the clerk of the Supreme Court of the United States, on plaintiff's appeal taken herein.

This September 25, 1916.

H. L. STONE,
W. A. COLSTON,
HELM BRUCE,
Attorneys for Plaintiff.

M. M. LOGAN,
Attorney for Defendants.

And on the same day, towit, September 25, 1916, an order was made and entered herein, same being in words and figures as follows, viz:

918 Louisville & Nashville R. R. Co., Plaintiff,
v.
Robert L. Greene et al., Defendants.

This day came the parties by their respective attorneys and filed their written agreement and in accordance therewith, it is ordered by the court that the time for filing the record on appeal herein with the clerk of the Supreme Court of the United States be and it is extended until December 1, 1916.

And on the same day, towit, September 25, 1916, an order was made and entered herein, same being in words and figures as follows, viz:

Louisville & Nashville R. R. Co., Plaintiff,
v.
H. M. Bosworth, et al., Defendants.

Leave is hereby given plaintiff to withdraw from the clerk's office the papers in this case and the papers in any of the cases decided or pending in this court pertaining to the assessment of franchise of railroad companies for any of the years 1912-1913-1914-&-1915, for the purpose of preparing the record for appeal to the Supreme Court of the United States.

919 District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

Louisville & Nashville Railroad Company, Plaintiff,
vs.
Robert L. Greene, Auditor of Public Accounts, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, of the State of Kentucky, individually and constituting the Board of Valuation and Assessment of the State of Kentucky; Robert L. Greene, Auditor of Public Accounts of the State of Kentucky, Thomas M. Jones, Assistant Auditor of Public Accounts of the State of Kentucky, M. M. Logan, Attorney General of the State of Kentucky, Charles H. Morris, First Assistant Attorney General of the State of Kentucky, O. S. Hogan, Second Assistant Attorney General of the State of Kentucky, D. O. Myatt, Third Assistant —— General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, State of Kentucky, and W. C. Marshall, County Attorney of Franklin County, Defendants.

Petition for Cross Appeal.

The defendants, Robert L. Greene, Auditor of Public Accounts, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of

State, of the State of Kentucky, individually and as constituting the Board of Valuation and Assessment of the State of Kentucky; Robert L. Greene, Auditor of Public Accounts of the State of Kentucky, Thomas M. Jones, Assistant Auditor of Public Accounts of the State of Kentucky, M. M. Logan, Attorney General of
920 the State of Kentucky, Charles H. Morris, First Assistant Attorney General of the State of Kentucky, O. S. Hogan, Second Assistant Attorney General of the State of Kentucky, D. O. Myatt, Third Assistant Attorney General of the State of Kentucky, Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, State of Kentucky, and W. C. Marshall, County Attorney of Franklin County, State of Kentucky, conceiving themselves aggrieved by the decree made and entered on the 13th day of June, 1916, do hereby appeal from said order and decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, and pray that this Cross Appeal may be allowed the Defendants and that a transcript of the record, proceedings and papers upon which this record and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

This 5th day of October, 1916.

M. M. LOGAN,
JOHN L. RICH,
Attorneys for Defendants.

The foregoing Cross Appeal is allowed.

____ ____,
District Judge.

This 5 day of Oct'r, 1916.

921 Said Assignment of Errors on Cross appeal filed herein on October 5, 1916 and filed by the foregoing order is as follows to-wit:

United States District Court, Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD CO., Plaintiff,
vs.
ROBERT L. GREENE, Auditor, et al., Defendant.

Assignment of Errors on Cross Appeal.

The Defendants and each of them assign and state that the Court in the trial and determination of the above entitled cause, committed errors as follows, towit:

1.

The Court erred in overruling Defendant's motion to dismiss Plaintiff's bill on the ground that the District Court had no jurisdiction to hear this case.

2.

The Court erred in overruling the Defendant's motion to dismiss on the ground that the bill of Complaint shows no equity on its face.

3.

The Court erred in overruling the Defendant's motion to dismiss on the ground that Plaintiff has an adequate remedy at law.

4.

The Court erred in overruling Defendant's motion to dismiss on the ground that the bill states no cause of action against
922 the Defendants or either of them under the Constitution and Laws of this State or under the Constitution and Laws of the United States.

5.

The Court erred in overruling Defendant's motion to dismiss on the ground that this is a suit against the State of Kentucky.

6.

The Court erred in holding in the decree that Plaintiff's property could not be assessed at more than sixty per cent of its fair cash value, estimated at the price it would bring at a fair voluntary sale for the supposed reason or for the reason that other property in the State or a great bulk of the other property in the State is habitually, willfully, intentionally and systematically assessed at not more than sixty per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale.

7.

The Court erred in holding that other property in the State or a great bulk of other property in the State not in the class or the character of property owned by Plaintiff is willfully, habitually, intentionally and systematically assessed at not more than sixty per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale.

8.

The Court erred in holding the Board of Valuation and Assessment of Kentucky followed a fundamentally wrong method in assessing Plaintiff's property for taxation.

9.

The Court erred in granting a decree enjoining the collec-
923 tion of taxes by the State of Kentucky and the County and taxing districts in the State, based upon an assessment greater

than sixty per cent of the fair cash value of Plaintiff's property estimated at the price it would bring at a fair voluntary sale.

10.

The Court erred in holding any part of the assessment made by the Board of Valuation and Assessment of Plaintiff's franchise void and in granting a decree enjoining the collection of any part of the taxes based upon an assessment of Plaintiff's franchise at the sum of $45,658,630.00.

11.

The Court erred in holding the assessment complained of, is in violation of the Fourteenth Amendment of the Constitution of the United States, thereby denying Plaintiff the equal protection of the law.

12.

The Court erred in holding the board pursued an erroneous method in finding the value of plaintiff's franchise and in enjoining the collection of taxes based thereon notwithstanding the Court was of the opinion and belief and so found that the value of Plaintiff's property in the State was of greater value than the sum at which it was assessed by the Board.

13.

The Court erred in holding the assessment of Plaintiff's property for taxation by Defendants was void, because the Board in arriving at its conclusions pursued an erroneous method or employed false reasoning, notwithstanding the Court found, the conclusions of the Board as to the value of Plaintiff's property in Kentucky, subject to taxation, were correct.

924 14.

The Court erred in holding that the mileage proportion of Plaintiff's lines in Kentucky compared with its mileage within and without the State of Kentucky was 26.4 per cent when in fact the mileage of Plaintiff's lines in Kentucky was 35.15 per cent of its lines within and without Kentucky.

15.

The Court erred in holding it was improper for the Board to consider the gross and net income of Plaintiff derived in Kentucky when ascertaining the value of Plaintiff's franchise therein.

16.

The Court erred in holding that the assessment of the franchise of Plaintiff at more than 60% of its real or true value for taxation

in Kentucky, when property of other classes in this state was assessed at only sixty per cent of its real value, was in violation of the rights guaranteed to Plaintiff under the Fourteenth Amendment of the Constitution of the United States and therefore said assessment was null and void.

17.

The Court erred in holding that Defendants were without right to value Plaintiff's franchise for taxation in Kentucky at more or at a greater percentage of their value than it had a right to believe other property in Kentucky was assessed at for taxation notwithstanding the fact that the Constitution of the State provides that said Board shall assess the franchise of all Railroad Companies at their fair cash value and failure to do so would work a forfeiture of their office.

925 18.

The Court erred in making an assessment on Plaintiff's franchise or property at 60% of its real or true value when the Constitution of the State of Kentucky and the laws thereof enacted pursuant thereto require and provide that the franchise or property of all railroad companies in the State shall be assessed for taxation at the fair cash value thereof.

Wherefore Defendants pray that so much of the decree as enjoins the Defendants from collecting taxes on more than $25,808,493.60 of the assessment complained of be reversed.

M. M. LOGAN,
JOHN L. RICH,
Attorneys for Defendants.

October 5, 1916.

Said bond on Cross appeal filed and approved by the foregoing order on October 5, 1916 is as follows, to-wit:

926 And on a day following, towit, October 5, 1916, an order was made and entered herein, same being in words and figures as follows, viz;

LOUISVILLE & NASHVILLE RAILROAD CO., Plaintiff,
v.
ROBERT L. GREEN et al., Defendants.

This day came the defendants by M. M. Logan and John L. Rich, their attorneys and filed herein and presented to the court their petition for cross-appeal and assignment of errors intended to be urged by them, praying also, that a transcript of the record and proceedings and papers upon which the decree herein was rendered,

duly authenticated, be sent to the Supreme Court of the United States and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the cross-appeal upon the defendants giving bond according to law in the sum of $1000.00.

Came the defendants by their attorneys and presented to the court a bond on cross-appeal herein, and same is approved by the court and ordered filed and the cross-appeal allowed.

Said Petition for Cross Appeal filed by the foregoing order on October 5, 1916 is as follows, to-wit:

927 District Court of the United States for the Eastern District of Kentucky.

768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
ROBERT L. GREENE et al., Defendants.

Bond.

Know al- men by these presents, that we, Robert L. Greene, Auditor, Sherman Goodpaster, Treasurer, James P. Lewis, Secretary of State, M. M. Logan, Attorney General, Charles H. Morris, First Assistant Attorney General, O. S. Hogan, Second Assistant Attorney General, D. O. Myatt, Third Assistant Attorney General, T. M. Jones, Assistant Auditor, Victor A. Bradley, Commonwealth's Attorney for the Franklin Circuit Court, and Wiley C. Marshall, County Attorney of Franklin County, as principals, and Sherman Goodpaster, James P. Lewis and M. M. Logan, sureties, acknowledge ourselves to be jointly indebted to the Louisville & Nashville Railroad Company, appellee in the above cause, in the sum of $1000.00 conditioned that whereas on the 13th day of June 1916, in the United States District Court for the Eastern District of Kentucky, in a suit depending in that court wherein the above mentioned principals were defendants and the Louisville & Nashville Railroad Company was plaintiff, numbered on the equity docket as 768, a decree was rendered against the said above mentioned principals, and they having obtained cross appeal to the Supreme Court of the United States and filed a copy thereof in the office of the clerk of the court to reverse the said decree, and a citation directed to the said Louisville & Nashville Railroad Company citing
928 and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington on the 2nd day of Nov. 1916 next. If the said above mentioned principals shall prosecute their cross appeal to effect and answer all cost if they fail to make plea good then

the above obligation to be void, else to remain in full force and virtue.

ROBERT L. GREENE, *Auditor;*
SHERMAN GOODPASTER, *Treasurer;*
JAMES P. LEWIS, *Secretary of State;*
M. M. LOGAN, *Attorney General;*
CHAS. H. MORRIS, *1st Ass't Att'y Gen'l;*
O. S. HOGAN, *2nd Ass't Att'y Gen'l;*
D. O. MYATT, *3rd Ass't Att'y Gen'l;*
T. M. JONES, *Assistant Auditor;*
VICTOR A. BRADLEY,
Commonwealth's Attorney for the Franklin Circuit Court;
WILEY C. MARSHALL,
County Attorney of Franklin County.
By M. M. LOGAN, *Attorney General,*
Counsel for Appellants.

M. M. LOGAN.
SHERMAN GOODPASTER.
JAMES P. LEWIS.

Bond approved this October 5, 1916.

A. M. J. COCHRAN,
U. S. Judge.

929 And on a day following, towit, on October 6, 1916, an order was made and entered herein, same being in words and figures as follows, viz:

In Equity. No. 768.

LOUISVILLE & NASHVILLE R. R. Co.
v.
ROBERT L. GREENE, Auditor, et al.

For satisfactory reasons appearing to the court the time for filing the record in this case in the Supreme court of the United States, pursuant to the appeal and cross-appeal sued out is extended until December 1, 1916.

A. M. J. COCHRAN, *Judge.*

930 On the same day, towit, October 5, 1916, the following citation was issued herein, same being returned and filed on October 25, 1916, towit;

UNITED STATES OF AMERICA:

The President of the United States to Louisville & Nashville Railroad Company:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty

days from the date hereof and pursuant to cross-appeal this day granted by the United States District Court for the Sixth Circuit and Eastern District of Kentucky, wherein you are plaintiff and now appellee, and Robert L. Greene, Sherman Goodpaster, James P. Lewis, Thomas M. Jones, M. M. Logan, Charles H. Morris, O. S. Hogan, D. O. Myatt, Victor Bradley and Wiley C. Marshall are defendants and now cross-appellants, to show cause if any there be why the decree rendered against the said cross-appellants as aforesaid should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Edward Douglass White, Chief Justice of the Supreme Court of the United States of America, this 5th day of October, 1915, and of the Independence of the United States the one hundred and fortieth.

[SEAL.]

A. M. J. COCHRAN,
Judge of the District Court of the United States for the Sixth Circuit and the Eastern District of Kentucky.

A copy of the within citation received this the 25th day of October, 1916.

H. L. STONE,
Counsel for Plaintiff.

931 District Court of the United States for the Eastern District of Kentucky.

In Equity. No. 768.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
vs.
ROBERT L. GREENE, Auditor, et al., Defendants.

Order.

The plaintiff's counsel having prepared and heretofore lodged in the clerk's office statement in condensed and narrative form of the evidence embraced and heard by the Court upon the trial of this case on its merits, which statement counsel for the defendants, after due notice, have examined and made certain objections thereto, mainly on the ground that Exhibit A with plaintiff's original bill in two volumes, containing 735 typewritten pages, being a transcript of the plaintiff's testimony before the Board of Valuation and Assessment, together with the exhibits therewith, at the hearings in 1913, is not incorporated into said statement in full, including questions and answers, and all other matters, although the testimony contained in said Exhibit A is fairly stated in condensed and narrative form, and plaintiff's counsel having asked the Court to approve said statement of the evidence aforesaid as presented, and said request, together with said objections of defendants' counsel, coming

on to be heard, counsel of both parties being present and consenting to the hearing thereof, and the Court being fully advised, after the argument of counsel, now orders and adjudges that the objections aforesaid of defendants' counsel to said statement of the evidence be and they are hereby overruled, and further orders and adjudges that said statement of the evidence as presented by plaintiff's counsel and lodged in the clerk's office is true, complete and properly
932 prepared, as required by Equity Rule 75, and the same is now approved by the Court, directed to be filed in the Clerk's office, and made a part of the record for the purposes of the appeal herein.

This November 8, 1916.

A. M. J. COCHRAN, *Judge.*

933 And on a day following, towit, on October 27th A. D. 1916 a præcipe was filed herein, same being in words and figures as follows:

United States District Court, Eastern District of Kentucky.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plaintiff,
v.
R. L. GREEN, &c., Defendants.

Præcipe.

The clerk will please copy into the record for the appeal to the Supreme Court of the United States the following parts of the record in the above styled cause, towit:

1. All pleadings.
2. All record entries, such as motions, orders, exceptions, etc.
3. Stipulation filed May 15, 1914 and June 8, 1914.
4. All opinions of the court.
5. Notice filed December 16, 1915.
6. Form of final decree tendered by plaintiff.
7. Final decree.
8. Statement of evidence.
9. Petition for appeal.
10. Assignment of errors.
11. Supersedeas bond.
12. Citation and acceptance thereof.
13. Petition for cross-appeal.
14. Assignment of errors on cross-appeal.

934 15. Bond on cross appeal.
16. Citation on cross-appeal and acceptance thereof.
17. Order approving statement of Evidence.
18. This præcipe.

M. M. LOGAN, *Att'y General.*
H. L. STONE,
HELM BRUCE,
W. A. COLSTON,
Att'ys for Plaintiff.

935 THE UNITED STATES OF AMERICA,
Eastern District of Kentucky:

I, J. W. Menzies, Clerk of the District Court of the United States for the Eastern District of Kentucky, do hereby certify the foregoing 935 pages to be a full, true and correct — of the record in the cause lately pending in the said court, wherein Louisville & Nashville Railroad Company was complainant and Robert L. Greene, Sherman Goodpaster and James P. Lewis et al. were defendants, in equity No. 768, as required by the stipulation of counsel therein, and the præcipe of the parties removing the case, as the same appears on file and of record in my office.

In Testimony Whereof, I have hereunto set my hand as Clerk of the aforesaid court, and affixed the seal thereto, at Frankfort, in said district, this 8th day of November, A. D. 1916 and of our Independence the 141st year.

[Seal United States of America, Eastern Kty. Dist. Court.]

JOHN W. MENZIES,
Clerk United States District Court
Eastern District of Kentucky.
By CHAS. N. WIARD, *Deputy.*

Endorsed on cover: File No. 25,608. E. Kentucky D. C. U. S. Term No. 778. Louisville & Nashville Railroad Company, appellant, vs. Robert L. Greene, Auditor of Public Accounts, et al., individually and as constituting The Board ofValuation and Assessment of the State of Kentucky, et al. File No. 25,609. Term No. 779. Robert L. Greene, Auditor of Public Accounts, et al., individually and as constituting The Board of Valuation and Assessment of the State of Kentucky, et al., appellants, vs. Louisville & Nashville Railroad Company. Filed November 15th, 1916. File No. 25,608 and 25,609.

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JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 778.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

versus

ROBERT L. GREENE, ET AL., APPELLEES.

No. 779.

ROBERT L. GREENE, ET AL., APPELLANTS,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLEE.

BRIEF FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

HENRY L. STONE,
WILLIAM A. COLSTON,
EDWARD S. JOUETT,
HELM BRUCE,
Solicitors.

December 18, 1916.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 778.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellant,*

versus

ROBERT L. GREENE, ET AL., - - - - - - - *Appellees.*

No. 779.

ROBERT L. GREENE, ET AL., - - - - - - *Appellants,*

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellee.*

Brief for Louisville & Nashville Railroad Company.

STATEMENT.

The State of Kentucky imposes what is called a franchise tax upon public service corporations. The sections of the Statutes having any bearing upon the subject are quoted in full in an appendix to this brief. While the tax

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NOTE—For sake of simplicity, and in view of the cross appeals, we will refer to the parties as plaintiff and defendants, as they stood in the court below.

is called a franchise tax, it is nothing more nor less than a tax on the intangible property of a corporation, and it has been so construed both by the Court of Appeals of Kentucky and by this court. In Henderson Bridge Company v. Commonwealth, 99 Ky. 623, in speaking of this scheme of taxation, the Court of Appeals of Kentucky said:

> "We find that by Section 4020 the Legislature, for the purposes of taxation of corporations, divided their property into tangible and intangible, leaving the tangible to be assessed by the officers of the county where the same was situated, but that as to the intangible (*which term was used as synonymous with franchises*),* directed that that should be valued and taxed as provided in Section 4077." (Page 639.)

And on writ of error from this court, in that same case, this court said:

> "The tax in controversy was nothing more than a tax on the *intangible property* of the company in Kentucky." (166 U. S. 150, 154.)

This intangible property, which, for convenience, we will call "franchise," as the statute calls it, is assessed by the Board of Valuation and Assessment (consisting of the Auditor, Secretary of State and Treasurer—see Appendix, Sec. 4077). For the year 1911 this Board assessed the franchise of the Louisville & Nashville Railroad Company at $11,899,200.00, but the next year (1912), without any material change in the property of the company, or its value, the Board assessed the company's

*All italics in this brief are ours.

franchise at $45,428,074.00, thus nearly quadrupling it, the result of which was that, whereas the taxes of this company on its franchise for the year 1911, including taxes due the State and the various counties and municipalities, all based on this assessment, aggregated $167,644.37, these same taxes for the year 1912, if this assessment should stand, would aggregate $559,306.89, an increase of $412,816.48 (Rec., 152). And while the assessment for the year 1912 is not the assessment involved in the case now before this court, which case involves the assessment of the same company for 1913, yet the assessment for 1913 is somewhat of an increase over that for 1912, the assessment for 1913 being $45,658,630.00 (Rec., 45), upon which the taxes, State, county and municipal, if this assessment should be upheld, would aggregate approximately $565,000.00, or an increase of approximately $420,000.00 above the taxes of 1911, being, as said before, nearly four times the amount, without any material increase in the property assessed or in the rate of taxation.

This extraordinary change in assessment followed a change in the personnel of the members composing the Board of Valuation and Assessment, which change followed a heated State election, and a warm session of the Kentucky Legislature, during which the matters of the State debt, and the assessment of corporations, were prominent subjects of consideration and debate, as shown by paragraph XXV of the bill of complaint (Rec., 65). Immediately following the assessment for the year 1912, the Louisville & Nashville Railroad Company filed a suit in the Federal Court for the Eastern District of Kentucky

against various persons, holding offices in Kentucky and charged with various duties in connection with the assessment, certification and collection of taxes, to enjoin the certification or collection of taxes based on the assessment complained of; the charge being that the assessment was arbitrary, capricious and grossly excessive; that the company had been illegally discriminated against; that its property had been assessed at greatly more than its actual value, whereas the property of all other taxpayers in the State was uniformly and knowingly assessed at greatly less than its actual value, in fact at not exceeding 60% of its actual value; that plaintiff in this way had been deprived of its property without due process of law, and had been denied the equal protection of the laws, contrary to the provisions of the Federal Constitution; and, moreover, that the method of assessment followed by the Board of Valuation and Assessment was contrary to the provisions of the Statutes of Kentucky, and was, for that reason, also illegal.*

After elaborate preparation and hearing, the court in that case granted a preliminary injunction, delivering at the time a very elaborate opinion, which has heretofore been referred to, and which is copied into this record (page 151; 209 Fed. 380). Plaintiff having, prior to the filing of its bill of complaint, paid to the State the taxes which it conceded to be due on its franchise, to-wit, an amount equal to what had been paid the year before, the court in this opinion reached the conclusion that while

*A change of officials occurred during the litigation, and new officials were substituted for the old, as defendants. (Rec., 244.)

plaintiff was entitled to an injunction because the assessment was utterly void, yet the court reached the further conclusion that the franchise was worth more than the amount of the assessment for the previous year, and, accordingly, required plaintiff to pay an additional amount as a condition to the granting of the preliminary injunction (209 Fed. 462, 465),* which additional amount plaintiff paid, though believing then, and still believing, that the court required it to pay greatly too much, whereupon the preliminary injunction was issued.

Before the case based on the 1912 assessment had been brought to a conclusion and a final decree, the Board of Valuation and Assessment made an assessment for the succeeding year, to-wit, 1913, slightly increasing the 1912 assessment. Thereupon the present suit was brought, being exactly the same in character as the one for the preceding year; and a preliminary injunction was granted, without the delivery of any written opinion, simply pursuant to the principles laid down in the opinion in the 1912 case. Thereafter an answer was filed and the case was prepared in chief; the evidence being supplied partly by stipulation as to facts and partly by affidavits which, under agreement, were read as depositions.

Before the bill was filed plaintiff had paid taxes equal in amount to the taxes which the court had required it

* It may be noticed that the reference just made to the court's opinion is to 209 Federal Reporter, and not to this record. The explanation of this is that while the court's opinion in the 1912 case is copied into this record, it appears that a supplement to that opinion, fixing the amount to be paid, as a condition to issuing the injunction, delivered somewhat later than the original, is not copied into this record, though it is found in 209 Federal Reporter, beginning at page 462, following immediately after the original opinion as Section 10 thereof.

to pay for the preceding year; for, while it believed that this payment was very excessive, yet it knew that the court would require payment of same as a condition to granting the injunction, so it paid them before filing the bill.

On final submission the court delivered a very full and complete opinion (Rec., 108; 230 Fed. 191), in which it upheld plaintiff's right to a decree and held that the assessment as made was void, but again held that plaintiff had not yet paid enough, and that it should pay taxes on an additional assessment of $2,909,192.60 (Rec., 151). And, accordingly, a final decree was entered, decreeing that the assessment which the Board of Valuation and Assessment had made of $45,658,630.00 was null and void, and enjoining all of the defendants from taking any step whatever, based upon that assessment, and from attempting to collect any taxes based thereon, or in any way giving effect thereto; but ordering plaintiff to pay, within sixty days, taxes on a valuation of $2,909,292.60, in addition to what it had already paid on, so as to make the entire amount upon which plaintiff was required to pay taxes for the year 1913, the sum of $25,808,493.60, and defendants were enjoined from assessing or attempting to collect taxes on any greater amount (Rec., 252). From this decree both plaintiff and defendants have appealed, plaintiff insisting that the court required it to pay too much, and defendants insisting that the bill should have been dismissed, and both appeals are now before the court, and presented by one record.

It would be almost impossible, and certainly not conducive to clearness to attempt to discuss the two appeals as if they were separate. The questions involved in them will necessarily be considered together as if but one case.

THE RAILROAD COMPANY'S ASSIGNMENT OF ERRORS.

The formal assignment of errors by plaintiff, the Louisville & Nashville Railroad Company, is found in the record, beginning at page 626. For the purposes of the brief, however, they may be somewhat abbreviated and stated as follows:

1. The court erred in requiring plaintiff to pay franchise taxes for the year 1913 on any additional sum above that upon which it had paid just prior to filing its bill of complaint ($22,899,200), and erred in holding that it should pay on any assessment in excess of $18,398,438.43, as shown by plaintiff's supplemental bill or, in fact, in excess of $11,349,479.27, the latter sum being the value which the court's opinion on final submission showed was the real value of plaintiff's franchise, assessable in Kentucky, according to the principles laid down in that opinion. (Assignments I, II, III, VIII, IX.)

2. The court erred in holding that in order to ascertain the value of plaintiff's franchise, assessable in Kentucky, the proper process was first to ascertain the value of all plaintiff's property, tangible and intangible, both in and out of Kentucky, and then to apportion a proper proportion thereof to Kentucky, and then to deduct the

assessed value of the tangible property in Kentucky, leaving the balance as the intangible property in Kentucky, instead of holding that the proper process was to first find the value of all its property, tangible and intangible, whether in Kentucky or out of Kentucky, and then to deduct from this sum the value of all its tangible property, both in Kentucky and out of Kentucky, leaving the balance to represent its intangible property in Kentucky and out of Kentucky, and then to apportion to Kentucky its proper proportion of this intangible property; as the process adopted by the court was contrary to the Statutes, and had the effect, moreover, of assessing in Kentucky property which lay outside of Kentucky, and of making the Board of Valuation and Assessment assess the tangible property of plaintiff, whereas its duty was only to assess the intangible property, and causes the effect of double taxation. (Assignments V, VI, VII.)

3. The court erred in holding that in apportioning to the State of Kentucky its proper portion of plaintiff's franchise for taxation, the Board was not required to apportion to the State of Kentucky merely its mileage proportion thereof, but that after having made the apportionment on a mileage basis, the Board then had the right to vary the result thus reached by adding to it, or subtracting from it, on account of other considerations leading to the conclusion that the true value of the franchise was more or less than the amount reached by making the apportionment on a mileage basis, as aforesaid. (Assignment X.)

4. As one step in the process of ascertaining and fixing the value of plaintiff's franchise in Kentucky was first to ascertain the total value of all of plaintiff's property of every kind everywhere, and as it appeared that the Board had adopted the process of capitalizing plaintiff's net income, in order to ascertain such total value, the court erred in holding that in considering whether or not the Board had adopted an improper method, the court could not review or revise either (1) the amount which the Board took as the actual net income to be capitalized, nor (2) the percentage at which the Board capitalized the said net income, nor (3) the amount which the Board deducted as the value of non-taxable property from the total value of plaintiff's property fixed by the Board. (Assignment XI.)

5. The court erred in holding that in determining the total value of plaintiff's property, of which a part was to be apportioned to Kentucky in determining the value of plaintiff's franchise, the Board should include, not only the value of *plaintiff's interest* in properties operated, owned, leased or controlled by it, but also the *entire value* of property operated, owned, leased or controlled by plaintiff, including interests therein *owned by other persons than plaintiff*. (Assignment XII.)

6. The court erred in not entering a final decree in the form presented and tendered by plaintiff. (Assignment IV.)

DEFENDANT'S ASSIGNMENT OF ERRORS.

"1.

"The court erred in overruling defendants' motion to dismiss plaintiff's bill on the ground that the District Court had no jurisdiction to hear this case.

"2.

"The court erred in overruling the defendants' motion to dismiss on the ground that the bill of complaint shows no equity on its face.

"3.

"The court erred in overruling the defendants' motion to dismiss on the ground that plaintiff has an adequate remedy at law.

"4.

"The court erred in overruling defendant's motion to dismiss on the ground that the bill states no cause of action against the defendants or either of them under the Constitution and laws of this State or under the Constitution and laws of the United States.

"5.

"The court erred in overruling defendant's motion to dismiss on the ground that this is a suit against the State of Kentucky.

"6.

"The court erred in holding in the decree that plaintiff's property could not be assessed at more

than sixty per cent of its fair cash value, estimated at the price it would bring at a fair voluntary sale for the supposed reason or for the reason that other property in the State or a great bulk of the other property in the State is habitually, willfully, intentionally and systematically assessed at not more than sixty per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale.

"7.

"The court erred in holding that other property in the State or a great bulk of other property in the State not in the class or the character of property owned by plaintiff is willfully, habitually, intentionally and systematically assessed at not more than sixty per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale.

"8.

"The court erred in holding the Board of Valuation and Assessment of Kentucky followed a fundamentally wrong method in assessing plaintiff's property for taxation.

"9.

"The court erred in granting a decree enjoining the collection of taxes by the State of Kentucky and the county and taxing districts in the State, based upon an assessment greater than sixty per cent of the fair cash value of plaintiff's property estimated at the price it would bring at a fair voluntary sale.

"10.

"The court erred in holding any part of the assessment made by the Board of Valuation and As-

sessment of plaintiff's franchise void and in granting a decree enjoining the collection of any part of the taxes based upon an assessment of plaintiff's franchise at the sum of $45,658,630.00.

"11.

"The court erred in holding the assessment complained of is in violation of the Fourteenth Amendment of the Constitution of the United States, thereby denying plaintiff the equal protection of the law.

"12.

"The court erred in holding the Board pursued an erroneous method in finding the value of plaintiff's franchise and in enjoining the collection of taxes based thereon, notwithstanding the court was of the opinion and belief and so found that the value of plaintiff's property in the State was of greater value than the sum at which it was assessed by the Board.

"13.

"The court erred in holding the assessment of plaintiff's property for taxation by defendants was void, because the Board in arriving at its conclusions pursued an erroneous method or employed false reasoning, notwithstanding the court found the conclusions of the Board as to the value of plaintiff's property in Kentucky, subject to taxation, were correct.

"14.

"The court erred in holding that the mileage proportion of plaintiff's lines in Kentucky, compared with its mileage within and without the State of Ken-

tucky, was 26.4 per cent when in fact the mileage of plaintiff's lines in Kentucky was 35.15 per cent of its lines within and without Kentucky.

"15.

"The court erred in holding it was improper for the Board to consider the gross and net income of plaintiff derived in Kentucky when ascertaining the value of plaintiff's franchise therein.

"16.

"The court erred in holding that the assessment of the franchise of plaintiff at more than 60% of its real value for taxation in Kentucky, when property of other classes in this State was assessed at only sixty per cent of its real value, was in violation of the rights guaranteed to plaintiff under the Fourteenth Amendment of the Constitution of the United States and therefore said assessment was null and void.

"17.

"The court erred in holding that defendants were without right to value plaintiff's franchise for taxation in Kentucky at more or at a greater percentage of their value than it had a right to believe other property in Kentucky was assessed at for taxation, notwithstanding the fact that the Constitution of the State provides that said Board shall assess the franchise of all railroad companies at their fair cash value and failure to do so would work a forfeiture of their office.

"18.

"The court erred in making an assessment on plaintiff's franchise or property of 60% of its real or true value when the Constitution of the State of Kentucky and the laws thereof enacted pursuant thereto require and provide that the franchise or property of all railroad companies in the State shall be assessed for taxation at the fair cash value thereof."

ARGUMENT.

I.

Jurisdiction of the Court.

We have not been able to bring ourselves to believe that the jurisdictional question in this case is the serious one which our opponents profess to consider it. The elaborate opinion of the District Court, delivered on the motion for a preliminary injunction in a case between these same parties, of the same character as the present, but involving the assessment for the year 1912, which, however, is copied into this record (page 151), and which is reported as Louisville & Nashville Railroad Company v. Bosworth, *et al.*, 209 Fed. 380, is, we submit, conclusive in support of the court's jurisdiction, and of that opinion we may say that we do not believe a more complete or satisfactory discussion of the question as to when a suit is, and when it is not, against a State can be found in any judicial decision or text-book, including, as the opinion does, an exhaustive review and analysis of all the authorities on the subject.

As, however, the objection to jurisdiction is still insisted upon on the cross-appeal in this case, we shall consider it in this brief very much as we did in the case below.

In our opinion, this question is settled in favor of the jurisdiction of the court by the opinion of this court in *Ex parte* Young, 209 U. S. 123, wherein the court made an elaborate review of this whole question; and, as we

will presently point out, since the decision of that case, the court itself has treated it as settling the question, and has, in subsequent cases, with possibly one exception, simply referred to the Young case as the final authority upon the subject of suing the State, and as to when a suit shall be regarded as one against a State, and when not.

To thoroughly understand the case of *Ex parte* Young and to appreciate its real significance, and what it does in effect decide, it is essential to understand just what was involved, and what the court did.

The State of Minnesota had passed a statute, fixing a certain schedule of rates on certain commodities. Certain stockholders of a railroad company filed a suit in equity against the railroad company itself, the members of the Railroad and Warehouse Commission of Minnesota and Edward T. Young as the Attorney General of the State. They stated facts bringing themselves within the equity rule permitting stockholders to sue on behalf of the corporation, and then charged that the rates fixed were confiscatory; that enormous penalties were fixed for a violation of the statute creating the rate, and prayed that the railroad company be enjoined from putting into effect the rates in question; that the Railroad and Warehouse Commission be enjoined from attempting to enforce it, and that the Attorney General be enjoined from instituting any action or proceeding against the defendant railway company, its officers and so forth, on account of any violation of the statute. A temporary restraining order was entered which, among other things, "restrained Edward T. Young, Attorney General, from

taking any steps against the railroads to enforce the remedies or penalties specified in the Act of April 18, 1907" (page 132). Subsequently a preliminary injunction was granted which, "enjoined the defendant Young, as Attorney General of the State of Minnesota, pending the final hearing of the case, from taking or instituting any action or proceeding to enforce the penalties and remedies specified in the Act above mentioned, or *to compel obedience to that Act, or compliance therewith or any part thereof.*" (Page 132.)

After the granting of the preliminary injunction the Attorney General, in violation of the injunction, filed a petition for writ of mandamus in one of the State courts, and obtained an order of mandamus commanding the company to adopt and publish and keep for public inspection as provided by law the rates and charges fixed by the Act heretofore mentioned. (Page 133.) A rule for contempt was issued from the United States Circuit Court against Mr. Young for violation of the injunction; he responded, insisting that the court was without jurisdiction to enter the injunction and that therefore he was not in contempt. The court, however, held he was in contempt, and made the rule absolute, and he was taken in charge of the marshal of the court. Thereupon he applied to this court for writ of habeas corpus; the marshal responded, stating the facts, and thus the case came before this court, and, of course, the question, and the only question, involved was as to whether or not the United States Circuit Court had jurisdiction to enter the order of injunction which it did.

We here call special attention to the fact that the injunction against the Attorney General was an injunction to restrain him from bringing different suits for penalties, or prosecuting different indictments for penalties, and was also an injunction to restrain him from instituting any action "to compel obedience to that Act," and that what he actually did, and for which he was held guilty of contempt, was to bring a single suit for mandamus against the railroad company to compel obedience to the Act; so that the jurisdiction of the court to enjoin him from bringing a single suit of that character was really the main point involved, and it was for a violation of this particular feature of the order that he was held guilty of contempt. Furthermore, this fact did not escape the attention of the court, for Mr. Justice Harlan, in his dissenting opinion, called particular attention to it, saying:

> "The Attorney General stated that all he did, or contemplated doing, was to bring the mandamus suit." (Page 197.)

The court recognized the very great importance of the question it had to decide, and also recognized that there were many expressions in opinions previously delivered by the court on this subject which were difficult of reconcilement, and it is manifest that the court attempted, in this opinion to consider with all the care possible this important question and to settle it finally so far as was in the power of the court; and it did succeed in making and publishing an opinion, from which only

one Justice, to-wit, Mr. Justice Harlan, dissented. The opening paragraph of the opinion by Mr. Justice Peckham is significant. It is as follows:

> "We recognize and appreciate to the fullest extent the very great importance of this case, not only to the parties now before the court, but also to the great mass of the citizens of this country, all of whom are interested in the practical working of the courts of justice throughout the land, both Federal and State, and in the proper exercise of the jurisdiction of the Federal courts as limited and controlled by the Federal Constitution and the laws of Congress.
>
> "That there has been room for difference of opinion with regard to such limitations the reported cases in this court bear conclusive testimony. It can not be stated that the case before us is entirely free from any possible doubt, nor that intelligent men may not differ as to the correct answer to the question we are called upon to decide.
>
> "The question of jurisdiction, whether of the circuit court, or of this court, is frequently a delicate matter to deal with, and it is especially so in this case, where the material and most important objection to the jurisdiction of the circuit court is the assertion that the suit is in effect against one of the States of the Union. It is a question, however, which we are called upon, and which it is our duty to decide. Under these circumstances the language of Chief Justice Marshall, in Cohens against Virginia, 6 Wheaton, 264, 404, is most apposite. In that case he said:
>
> " 'It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary can not, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We can not pass it by because it is doubtful. With whatever doubt, with whatever difficulties, a

> case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.'" (Page 142.)

The court then takes up the question, and, after the examination of many authorities, the following is its statement of the principle to be deduced from them:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional Act violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." (Page 155.)

Of course, it will be remembered that the injunction in this case was an injunction against the bringing of a suit, and the court did not overlook that fact, but expressly considered the question of the power and the right of a court of equity to enjoin the commencement of a suit, and refered to various authorities justifying this action. The court begins its consideration of that question with this sentence:

> "Whether the commencement of a suit could ever be regarded as an actionable injury to another, equivalent in some cases to a trespass such as is set forth in some of the foregoing cases, has received attention in the rate cases so-called." (Page 153.)

Whereupon the court proceeds to refer to and consider the cases of Reagan against Farmers' Loan and

Trust Company, 154 U. S. 362, and Smyth against Ames, 169 U. S. 466, and so forth. See the further language of the court to the same effect, page 167. And since the decision of the Young case it has been treated by this court as absolutely settling this question of the right of a court of equity to enjoin the bringing of a suit for the enforcement of the provisions of an unconstitutional Act.

Thus, in Western Union Telegraph Company against Andrews, 216 U. S. 165, suit was brought against the prosecuting attorneys of seventeen judicial circuits of the State of Arkansas to prevent them from instituting actions against the Western Union Telegraph Company to recover penalties on account of its violation of "An Act to permit Foreign Corporations to do business in Arkansas and fixing fees to be paid by all corporations," which act this court held to be unconstitutional. The Federal Circuit Court dismissed the bill for injunction against the prosecuting attorneys, delivering quite an elaborate opinion, in which the court held that the suit then before it was in substance and effect a suit against the State of Arkansas; but this court reversed the decree of the circuit court, in a very brief opinion, simply relying upon the case of *Ex parte* Young as a settlement of the matter. The court quotes the following language from *Ex parte* Young, to-wit:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to com-

mence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional Act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

The court then proceeds:

* * * "As this case is ruled, upon the question of jurisdiction, by the case of *Ex parte* Young, it is unnecessary to consider the question further." (Pages 166, 167.)

A similar question was raised in Herndon, Prosecuting Attorney, v. The Chicago, Rock Island, etc., R'y Co., 218 U. S. 135, which was a suit seeking, among other things, to enjoin the prosecuting attorney from instituting a prosecution against the railroad company for its violation of an act requiring interstate trains to stop at certain stations within the State of Missouri. The court disposed of the jurisdictional question with the following brief statement:

"As to the objection that the suit is one against the State, we think no discussion is necessary, and content ourselves with a reference to the late cases in this court to that point. *Ex parte Young,* 209 U. S. 123; Western Union Telegraph Company against Andrews, 216 U. S. 165." (Page 155.)

It is urgently insisted, however, by counsel for the defendants that the rule to which we have referred only applies to the granting of an injunction against bringing a suit to enforce an unconstitutional Act of the Legislature. Counsel, as if in support of this proposition,

quotes from a number of cases where suits in equity have been upheld enjoining the enforcement of unconstitutional statutes. There is no doubt at all that the jurisdiction does exist to enjoin proceedings about to be taken under an unconstitutional statute, but there is no authority whatever for the proposition that the rule is confined to injunctions against the enforcement of unconstitutional statutes. It applies just as well against the enforcement of unconstitutional *acts* of any other State tribunal as it does to the unconstitutional acts of the Legislature. It must be remembered that an executive officer may do an act or threaten an act which is in violation of the Constitution just as well as in the case of a legislative body. The question is: Is the act in violation of the Constitution? If so, it matters not whether it is the act of the Legislature or the act of an executive officer or the act of a court. Suppose the Legislature of Minnesota should adopt a statute, just as the one involved in the Young case, which fixed specific rates to be charged; and suppose that the Legislature of Michigan should adopt an act creating a Railroad Commission which should then in turn fix exactly the same rates as were fixed by the Minnesota legislative act. Suppose a railroad company whose road ran through the two States should consider that those rates were confiscatory and should file a bill to enjoin the enforcement thereof. Would any one say that a suit against the officers about to enforce the Minnesota act fixing the rates could be maintained because it was a suit to enjoin the enforcement of an unconstitutional *legislative act*, but

that the suit against those about to enforce the Michigan rates could not be maintained because it was a suit to enjoin not an unconstitutional *legislative* act but an unconstitutional *executive act?* Such a proposition would be absolutely without any foundation in reason.

It is needless, however, to argue upon this question as an original question, because it has been absolutely settled by this court.

In Reagan v. Farmers' Loan and Trust Company, 154 U. S. 362, the matter complained of was certain rates fixed by the Railroad Commission of Texas. There was no claim whatever that the *statute* creating the Commission authorizing it to fix rates was unconstitutional, but the complaint was that the *act of the Commission* in fixing rates so low as to be confiscatory was unconstitutional; and the Attorney General of the State was enjoined from bringing any suit to enforce those rates, or to recover any penalties for the refusal to adopt them by the railroad companies. It was suggested in the argument of the case at bar that in that case the statute of Texas authorized the bringing of a suit to test the reasonableness of the rates. But in *Ex parte* Young the court calls attention to the fact that in the Reagan case the statute of Texas only authorized the bringing of a suit against the Commission, whereas the suit was actually brought, and the decree actually entered, against the Attorney General as well; and that the court expressly based its decree and the jurisdiction of the court upon general principles as well as upon the Texas statute.

In *Ex parte* Young, in speaking of the Reagan case, the court says:

> "It is true the statute in that State, creating a board provided that suit might be maintained by any dissatisfied railroad company, or other party in interest, in a court of competent jurisdiction in Travis County, Texas, against the Commission as a defendant. This court held that such language permitted a suit in the United States Circuit Court for the Western District of Texas, which embraced Travis County, but it also held that, *irrespective of that consent*, the suit was not in effect a suit against the State (although the Attorney General was enjoined) and therefore not prohibited under the amendment. It was said in the opinion, which was delivered by Mr. Justice Brewer, that the suit could not in any fair sense be considered a suit against the State (page 392), and the conclusion of the court was that the objection to the jurisdiction of the Circuit Court was not tenable, whether that jurisdiction was based (page 393) 'upon the provision of the statute or upon the general jurisdiction of the court existing by virtue of the statutes of Congress and the sanction of the Constitution of the United States.' Each of these grounds is effective, and both are of equal force." (Page 153.)

Again in the case of Raymond, Treasurer, v. Chicago Union Traction Company, 207 U. S. 20, to which we will hereafter refer more particularly upon the merits of the case, a suit was brought and maintained, the decree being affirmed by this court, enjoining a tax collector from collecting taxes (part of which went to the State and part to the municipalities) based on an assessment of the franchise of certain corporations, without equalizing these assessments with the assessments of other properties, it

being shown that all other property in the State was uniformly assessed at less than its real value. And in this case there was absolutely no complaint that the statute was unconstitutional; but the insistence was exactly as in the case at bar, that the act of the Board of Equalization, under the statute, was in violation of the Fourteenth Amendment in that it denied the equal protection of the law to the complainants. Counsel admitted in the argument below that this Raymond case is of the character mentioned and they spoke of it as the one case which stands out against their view; and they attempted to explain this by saying that in the Raymond case the Board of Equalization, in making the assessment complained of, acted simply pursuant to the judgment of the Supreme Court of Illinois in certain mandamus proceedings. This court, however, does not base its opinion upon any such ground. On the contrary, the court expressly bases its opinion on the ground that the Board of Equalization represented the State in making the assessment it did, and that the Fourteenth Amendment covers actions by *any of the departments of State,* whether legislative, executive or judicial. On that subject the court, by Mr. Justice Peckham, says:

> From the decision of the Board, in making such assessment, no appeal is provided for, and such decision is therefore conclusive, except as proceedings for relief may thereafter be taken in courts. As to the assessments of local assessing bodies, the Board is one of review, but its decisions are equally conclusive, as in the case of original assessments. Acting under the Constitution or laws of the State, the

> Board therefore represents the State, and its action is the action of the State. The provisions of the Fourteenth Amendment are not confined to the action of the State through its Legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that, whoever by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State, and is clothed with the State's powers, his act is that of the State. Chicago, B. and Q. R. Co. v. Chicago, 166 U. S. 226. Following the above case, the Federal courts throughout the country have frequently reviewed the action of taxing bodies, when, under the facts, such action was in effect the action of the State, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question. See Nashville, etc., R'y Co. v. Taylor, 86 Federal, 168; Louisville Trust Company v. Stone, 46 C. C. A. 299, 107 Fed. 305." (Page 35.)

The quotation just made shows that the court did not uphold the jurisdiction of the Federal Court to enjoin the enforcement of this tax on the ground that any statute involved was unconstitutional, but on the ground that the act complained of, and which the court held violative of the Constitution, being the act of a board which acted in the name of and on behalf of the State of Illinois, was the act of the State.

Again this identical point has been decided in the later case of Philadelphia Company against Stimson, Secretary of War, 223 U. S. 605. In this case the Secretary of War had defined certain harbor lines at Pittsburgh which

took in property that the Philadelphia Company considered to belong to itself. It therefore brought a suit in equity to enjoin Mr. Stimson from thus fixing the line. It was insisted that this was a suit against the State, and the point was made that there was no complaint in the bill as to the validity of any statute, but that the complaint was simply against the action of Mr. Stimson, as Secretary of War, under the statute. On that subject the Supreme Court, through Mr. Justice Hughes, said:

> "It is urged that the statute authorizing the Secretary of War to prevent encroachments upon the navigable streams is a valid one, and that the decisions do not apply. The validity of the statute is not attacked, because of the assumption that it is not to be construed to contemplate or authorize the alleged deprivation of property. Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power, and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. *Ex parte* Young, 209 U. S. 159. *And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of Government against the individual owner, is guilty of an invasion of private property.*" (Page 621.) (Our italics.)

It is therefore manifest that the rule as to the power of a court of equity to enjoin one who is about to do an unlawful act, or is threatening to enforce an unlawful act, is not confined to the case where the unlawful act is

the act of a legislative body, but applies equally to every case where the act is unlawful in being violative of the Constitution, whether the act be of a legislative body or of an executive body or of a judicial body.

As suggested before, counsel in discussing the case of Raymond v. Chicago Traction Co., 207 U. S. 20, undertook to explain that case by saying that, while the court there enjoined the action of the Board of Valuation and Assessment, a purely executive tribunal, yet it appeared that this Board had acted simply pursuant to a mandamus from the Supreme Court of Illinois, so that the action of the Board had the sanction, and in fact was in obedience to, a decision of the Supreme Court of the State. And it has been argued, and may be argued again, that the act of an executive officer of a State will not be considered the act of the State, where its validity is questioned, until it has been upheld by the Supreme Court of the State. As we have heretofore pointed out, this court, in its opinion in the Raymond case, did not rest its conclusions, to any extent, upon the fact that the act of the Board there involved was pursuant to an order from the Supreme Court of the State, but upon the conclusion that "whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition." But if there can be any doubt about this question having been settled in Raymond v. Chicago Traction Co., there can be absolutely no doubt that it is completely disposed of by the opinion of this court in Home Telephone Co. v. City of Los Angeles,

227 U. S. 278, in which the main question was as to whether or not an act of an executive officer could be said to be the act of a State, before it had received the sanction of a court of last resort of that State, and where this court, in a most elaborate opinion by the Chief Justice showed that there was no necessity for such approval, in order that the act of the officer might be considered the act of the State within the meaning of the Fourteenth Amendment to the Federal Constitution. It is sufficient to quote the following language from that opinion in which the court briefly states the proposition asserted, and the court's denial of it, as follows:

> "By the proposition the prohibitions and guarantees of the amendment are addressed to and control the States only in their complete governmental capacity, and as a result give no authority to exert Federal judicial power until by the decision of a court of last resort of a State, acts complained of under the Fourteenth Amendment have been held valid and therefore State acts in the fullest sense. *To the contrary* the provisions of the amendment as conclusively fixed by previous decisions are generic in their terms, are addressed, of course, to the States, but also to every person, whether natural or juridical, who is the repository of state power. By this construction the reach of the amendment is shown to be co-extensive with any exercise by a State of power, in whatever form exerted." (Page 286.)

And, referring to the case of Barney v. New York, 193 U. S. 430, which was much relied upon in the court below in the present case, this court, in the Home Telephone Company case, in reviewing this authority, said:

> "As to the other—the Barney case—it might suffice to say, as we have already pointed out, it was considered in the Raymond case, and if it conflicted with the doctrine in that case and the doctrine of the subsequent and leading case of *Ex parte* Young, it is now so distinguished or qualified as not to be here authoritative or even persuasive." (Page 294.)

Furthermore, it happens to be true in the case at bar that the principle upon which the Board of Valuation and Assessment acted, and of which we complain, to-wit, that it was not required to equalize the assessment of railroad property with the assessment of other property in the State, has been approved by the Court of Appeals of Kentucky in the case of Louisville Railway Co. v. Commonwealth, 105 Ky. 710, where the Court of Appeals in effect held that if a minority is oppressed by the action of State officers, the remedy of the minority is to elect better officers, notwithstanding the fact that the minorities do not elect officers.

Great reliance was placed in the argument at bar on the case of Fitts v. McGhee, 172 U. S. 516. Whether or not we can reconcile every sentence in Fitts v. McGhee with the case of *Ex parte* Young, and the later cases, we will not stop to inquire. The court, in *Ex parte* Young, expressly and at length considered the Fitts case; and the following is the explanation which this court itself made of it, and which we are entitled to accept as final. After stating that it was contended that Fitts v. McGhee limited the principle which the court had just laid down, and which we have heretofore quoted from *Ex parte* Young, the court then proceeds to say:

"We do not think such contention is well founded. The doctrine of Smyth v. Ames was neither overruled nor doubted in the Fitts case. In that case the Alabama Legislature, by the Act of 1895, fixed tolls to be charged for crossing a bridge. The penalties for disobeying that act by demanding and receiving higher tolls, were to be collected by the persons paying them. *No officer of the State had any official connection with the recovery of such penalties.* The indictments mentioned were found under another State statute, set forth at page 520 of the report of the case, which provided a fine against an officer or a company for taking any greater rate of toll than was authorized by its charter, or, if the charter did not specify the amount, then the fine was imposed for charging any unreasonable toll, to be determined by a jury. This act was not claimed to be unconstitutional, and the indictments found under it were not necessarily connected with the alleged unconstitutional act fixing tolls. As no State officer who was made a party bore any close official connection with the act fixing the tolls, the making of such officer a party defendant was a simple effort to test the constitutionality of such act in that way, and there is no principle upon which it could be done. *A State Superintendent of Schools might as well have been made a party* * * * In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." (Pages 156 and 157.)

In this same connection, however, in order that the court might not be misunderstood in its statement which is quoted, the court proceeds further to say:

"It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed (154 U. S. 362, 366, Section 19 of the act), but that may possibly make the duty more clear; if it otherwise exists, it is equally efficacious. The fact that the State officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law or is specially created by the act itself, is not material so long as it exists." (Page 157.)

There is another principle established in *Ex parte* Young which has direct application to the case at bar, and especially to that part of it which seeks to enjoin the Attorney General from bringing a suit for the collection of the State taxes, or instituting criminal proceedings for a failure to pay. In the case out of which *Ex parte* Young arose, the injunction prohibited the prosecution of criminal proceedings for a violation of the act, and, with reference to that part of the injunction, the court, in *Ex parte* Young, said:

"It is further objected (and the objection really forms part of the contention that the State can not be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the State law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal Court, the latter court, having first obtained jurisdiction over the subject-matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction to the exclusion of all other courts until its duty is fully performed. Prout v.

Starr, 188 U. S. 537, 544. But the Federal Court can not, of course, interfere in a case where the proceedings are already pending in a State Court. Taylor v. Taintor, 16 Wallace, 366, 370; Harkrader v. Wadley, 172 U. S. 148.

"Where one commences a criminal proceeding who is already a party to a suit then pending in a court of equity, if the criminal proceedings are brought to enforce the same right that is in issue before that court, the latter may enjoin such criminal proceedings. Davis & Co. v. Los Angeles, 189 U. S. 207. In Dobbins v. Los Angeles, 195 U. S. 223, 241, it is remarked by Mr. Justice Day, in delivering the opinion of the court that 'it is well settled that where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by a court of equity.' Smyth v. Ames, *supra,* distinctly enjoined proceedings by indictment to compel obedience to the rate act." (Page 161.)

The essential fundamental principle involved in the statement just quoted from this court is that where a Federal court of equity gets jurisdiction of a case involving the determination of a property right, it will not permit other proceedings to be instituted in a State Court, even though they be criminal proceedings (that ordinarily equity will not enjoin) which necessarily require a determination of the very property rights over which the Federal court has first acquired jurisdiction.

Now, in the case at bar, we submit there can be no real doubt of the jurisdiction of this court to enjoin the apportionment of the franchise assessment among, and its certification to, the various counties and municipalities interested therein, and undoubtedly, therefore, under

the principle of *Ex parte* Young it can also enjoin the institution of criminal proceedings for the enforcement of penalties for the failure to pay taxes under the assessment, and necessarily, by exactly the same principle, it has jurisdiction to enjoin a suit by the Attorney General for the collection of State taxes *based upon this identical assessment.* In this case, so far as it applies to the counties and cities, the ultimate question finally to be decided on the merits is that of the validity or invalidity of the assessment of the railroad company's franchise by the Board of Valuation and Assessment. That is the ultimate question in the case which the court below acquired jurisdiction to decide, and had to decide. And identically this same question, which is a question of property right of vast import, would be the fundamental question in any suit which the Attorney General might bring for the collection of a State tax, and would also be the fundamental question in any prosecution he might institute for the enforcement of penalties for the failure to pay either the State or county and municipal taxes. And in *Ex parte* Young the principle was carried to this full extent; because, as we have heretofore pointed out, the injunction in *Ex parte* Young not only enjoined the Attorney General from bringing proceedings, civil or criminal, to enforce penalties, but enjoined him from bringing *any character of action to enforce compliance with the act;* and what he actually did bring was simply a civil action of mandamus, and it was for the bringing of that suit that he was held to be guilty of contempt, and this was the real foundation of the *Ex parte* Young case.

It is also true that in Raymond, Collector, v. Chicago Union Traction Company, 207 U. S. 20, heretofore referred to, the taxes which Raymond was enjoined from collecting were partly taxes due the State of Illinois, as well as municipal taxes. This distinctly appears from the latter part of the case where the court is discussing the question of whether or not there was an adequate remedy at law, and where the court says:

> "If the plaintiff instituted a suit to recover back the taxes so paid to the town and county collector, he would be obliged to bring separate suits against each one of the several taxing bodies receiving its proportionate share of the tax, thereby necessitating a multiplicity of suits, *and the proportion of the tax which would go to the State of Illinois could not be collected back by any legal proceeding whatsoever.*" (Pages 39, 40.)

It is thus made manifest in that case that the Federal Court did enjoin the collection of a State tax based on this unconstitutional assessment.

Of course, in referring to the principle last mentioned, to-wit, the jurisdiction of a Federal court of equity to completely decide the whole matter when once it gets jurisdiction of a question, and in making special application of that to the question of enjoining the collection of the State taxes in the case at bar, we do not mean to suggest that that is the only principle which justifies such injunction. All of the reasoning in the *Ex parte* Young case applies just as well to an injunction against the Attorney General from bringing a suit to collect the State taxes as it does to a suit to enjoin the certification of the

assessment to the counties and towns. We only mention the other principle, because it is so clearly stated in the *Ex parte* Young case and is so directly applicable.

Reference in the court below was made to the case of Coulter v. Louisville & Nashville Railroad Company, 196 U. S. 599, as containing the statement that the collection of a tax due *the State* could not be enjoined. The court's statement on that subject is very brief and refers, as authority on the proposition, to the case of Coulter v. Weir, 127 Fed. 897. But when that case (Coulter v. Weir) is examined it will be found that the ground on which the court there held that the State tax could not be enjoined was simply that the officer, who was the sole defendant in the case, to-wit, the Auditor, had nothing further to do with the collection of the State tax, and that, as said by the court in *Ex parte* Young, "a State superintendent of schools might as well have been made a party." And this was doubtless the view of the court in Coulter v. Louisville & Nashville Railroad Company, *supra*, though the subject is not elaborated in that opinion.

Moreover, if the one sentence referred to in Coulter v. Louisville & Nashville Railroad Company, 196 U. S., is in conflict with the principles settled by the later cases, such as Raymond v. Chicago Traction Co., 207 U. S., *supra*, where the collection of taxes based on an unconstitutional assessment was enjoined, *a part of the taxes thus enjoined being State taxes*, of course, the later decision is the law.

In conclusion on this question, we simply repeat the language of this court in *Ex parte* Young, which states the result of the whole matter in words which have since often been referred to by the court as a settlement of the question, to-wit:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten or are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

We have already referred to the authorities, making it perfectly plain that it matters not whether the unconstitutional act be the act of a Legislature, or the act of an executive officer, or the act of a judicial tribunal.

II.

Jurisdiction Over Questions of Local Law.

If we have established the proposition, as surely we have, that the court has jurisdiction in this case by reason of a Federal question *raised in good faith,* then the court has power not only to decide the Federal questions, but any question of local law that may arise in the litigation. The most striking example of this is in the case of Siler v. Louisville & Nashville Railroad Company, 213 U. S. 175, which was a suit between citizens of Kentucky, and which depended for the court's jurisdiction upon the

Federal questions involved; but the case was decided by this court solely upon the question of local law, and on that subject the court said:

> "The Federal questions as to the invalidity of the State statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all questions in the case, even though it decided the Federal questions adversely to the parties raising them, or even if it omitted to decide them at all, but decided the case on local or State questions only.
>
> "This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the parties claiming their benefit." (191.)

The court knows that the Federal questions raised in the case at bar are not merely colorable, but that they are raised in good faith. We insist that the act of the Board of Valuation and Assessment is an absolute act of spoliation and that the complainant's property is taken without due process of law. We also insist that the assessment of the complainant's property at one rate, whereas the property of other persons is uniformly and intentionally assessed at a different rate, is a denial to the complainant of the equal protection of the laws. Whether these propositions be or be not maintained, they are unquestionably made in good faith, and the court, therefore, has unquestionable jurisdiction of the case; and, under the principle just stated, can decide questions of local law as well as these Federal questions.

III.

Jurisdiction in Equity.

It remains briefly to consider the question of the jurisdiction of the court as a court of equity. One simple fact which of itself shows the jurisdiction of a court of equity is that the tax under the assessment in question is by statute made a lien upon all the property of the corporation, including its real estate, and that therefore it casts a cloud upon the title to real estate.

One of the very cases referred to by counsel for the defendants in their brief, in the court below, the case of Pacific Express Company v. Seibert, 142 U. S. 399, says:

> "But when the illegality of the tax or the invalidity or unconstitutionality of the legislative act under which it is imposed is established, it becomes necessary to go further and make out a case that can be brought under some recognized head of equity jurisdiction; such as that the collection of the tax sought to be restrained may entail a multiplicity of suits, or cause some other irreparable injury, as, for instance, the ruin of complainant's business, or, *where the property is real estate, throw a cloud upon the title of the complainant.*" (Page 348.)

In Kentucky a lien exists on all the taxpayers' property for whatever taxes he owes (Ky. Stats., Sec. 4021; Reams v. McHargue, Sheriff, 111 Ky. 163, 171; Allen v. Perrine, 103 Ky. 516, 520).

But, furthermore, in the case at bar, it is alleged in the bill, and is a fact, that if the Auditor is permitted to certify the apportionment of the assessment to the vari-

ous counties and cities, he will certify them to quite a large number of the subdivisions of the State, and they will demand taxes based upon them, and will institute suits for the collection thereof under Section 4104 of the Kentucky Statutes, and, in addition to which, complainant will be prosecuted for penalties at the rate of $50.00 per day for each day it fails to pay any of the taxes due to the State or any county or municipality under Section 4091 of the Kentucky Statutes, all of which will lead to multiplicity of suits, which is another distinct ground for the intervention of a court of equity.

Again, in the case of Raymond v. Chicago Union Traction Company, 207 U. S. 20, which, as we have seen, was a suit very much like this, to enjoin the collection of a tax based on an assessment which disregarded the equal protection clause of the Constitution, the court said:

> "We are also of opinion that the case is one over which equity has jurisdiction. In Cummings v. National Bank, 101 U. S. 153, this court held that the case was one properly brought in equity. It was to restrain the collection of a tax. While the court held that the position of the bank, as trustee, entitled it to maintain an action in equity, and also under the statute of Ohio, it was further held (p. 157): 'Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate the fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power.'

"We have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method and manner of assessing property of the same kind. Although the law itself may be valid and provide for proper valuation, yet if, through mistake on the part of the State, through its Board of Equalization and while acting as a quasi-judicial body, the Board erred in the method to be pursued in relation to the corporations now before us, *the mistake is one which may be corrected in equity.*" (Page 37.)

The assessment in the case at bar was certainly the result either of mistake or fraud, either one of which gives jurisdiction to a court of equity.

As a branch of this question as to the jurisdiction in equity, it is said there is an adequate remedy at law. That remedy is said to be given by the following section of the Kentucky Statutes:

"SECTION 162. When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were, in fact, due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

In the first place, of course, this section gives absolutely no remedy for the recovery of the taxes paid to the counties or municipalities. It applies only to taxes paid into the State treasury. It certainly, therefore, would not defeat the court's jurisdiction of this action, and if the court has jurisdiction of this action in part, it will exercise the jurisdiction to settle the entire controversy as heretofore mentioned.

But, in the second place, it is not by any means as complete and adequate a remedy as is the remedy in equity. The suggestion is that the complainant should pay this enormous amount of taxes demanded of it into the treasury and then should sue to recover it back. The result of that would be, of course, long litigation, going ultimately to this court, at the end of which litigation, if it should be finally determined that the assessment was void, the complainant would have a right to go to the Auditor and ask for a warrant on the treasurer for the payment of "the money so improperly paid." It will be observed this makes no provision for a payment of interest. The statutes simply authorizes the drawing of a warrant for the amount of money paid into the treasury. In the case at bar, where the amount demanded, over and above that which complainant admits, is, as we have seen, on the State taxes alone, $167,644.37, the court will observe the large sum in interest on this amount that will accumulate month by month and year by year. As we have stated, this statute makes no provision for the repayment of this interest.

Furthermore, the statute does not in fact require a payment of money at all. It simply provides that the Auditor shall *issue his warrant* for the money paid. Even when complainant received its warrant that would not be money, and if the treasury happened to be then in the condition it is in now, the complainant might have to wait an indefinite time before it received actual payment in money; and possibly it might have to bring suit against the treasurer to compel him to pay the warrant. It is perfectly manifest that this statute does not give as complete and efficacious remedy in such a case as we have here as does a proceeding in equity.

IV.

The Merits.

We have mentioned that the tax under consideration has been held, both by the Court of Appeals of Kentucky, and by this court, to be a mere property tax, a tax upon the intangible property of certain kinds of corporations (mainly public service corporations). The value of the property to be thus taxed must, therefore, be ascertained; in other words, it must be assessed. And this assessment is not like the assessment of a horse, or a cow, or a bond, or a house and lot, or a tract of land, where the question of value is simply a question of judgment on the part of a person familiar with such properties; but in this case the assessment is a more or less complicated matter; it is one in which a method or process must be pursued in arriving at the ultimate value of the thing to be taxed.

And the correctness of the method pursued in accomplishing this result is a very important matter, for, while ordinarily the judgment of an assessing officer or tribunal upon a mere question of fact is practically conclusive, unless mistake or fraud be charged, yet the Court of Appeals of Kentucky has more than once held, in cases arising under the statute now under consideration, that if the assessing tribunal pursues an erroneous method, one not authorized by the statute, in fixing the value of the so-called "franchise," or intangible property of a corporation, the collection of it should be enjoined.

This was held in the first case that arose in Kentucky under this statue, a case which ultimately came to this court (166 U. S. 150). We refer to the case of Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, in which the court, after a very elaborate discussion of the statute, said:

> "It should be further said that the findings of this Board of Valuation and Assessment partake of a judicial nature. The defendant had its day in court. It did appear on notice before that Board and on evidence made its defense. And on this hearing that Board rendered its decision in fixing the value of the franchise of defendant, granted by authority of the State of Kentucky, and this finding, if not conclusive, is entitled to a very high degree of consideration and authority, and it should not be lightly set aside or disregarded by the courts, *unless the Board proceeded upon an erroneous principle or adopted an improper mode or manner of estimating the value of the franchise,* or unless fraud is charged and shown to exist" (page 645).

Again, in a much later case, Hager, etc., v. American Surety Co., 121 Ky. 791, the court laid down and applied the same principle. This case involved the assessment of the franchise of the Surety Company, the manner of assessing which the court held to be governed by the provisions of §4080 of the Kentucky Statutes, as the same was written at that time—it having since been amended. As the law was then written, it plainly provided, and the court so held, that when the Board had fixed the value of the total capital stock of the character of corporation there involved, it should then "determine from the amount of the gross receipts of such corporation, company or association, in this State and elsewhere, the proportion which the gross receipts of this State, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock less the assessed value of the tangible property assessed or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State." The Board, however, in assessing the American Surety Company, had simply ascertained its *net receipts from business in Kentucky,* and had capitalized this amount as a means of ascertaining and fixing the value of its taxable capital in Kentucky. And the Court of Appeals held that this assessment was void, because the statute *did not authorize this method* of fixing the value of capital; the court saying that the method fixed by the statute was to ascer-

tain the proportion of the gross receipts from business in Kentucky to the total gross receipts in Kentucky and elsewhere, and then to apply this proportion thus fixed to the total capital, and accept the result as the value of the taxable capital in Kentucky (from which tangible property was to be deducted, if there should be any). In concluding its opinion on this subject, the Court of Appeals said:

> "Whether the tax realized by this method of assessing the valuation of appellee's corporate franchise would be more or less than the amount ascertained by the process adopted by the Board of Valuation and Assessment is not material. The question presented for our consideration is one of statutory construction. We are of opinion *that the Board of Valuation and Assessment has no powers save those conferred by statute;* and, as there is no statutory recognition of its right to 'capitalize the net earnings' in this State as the basis for taxation of the corporate franchise of a foreign corporation, *its act in doing so in this case was unauthorized.* The only method of assessing such franchise is prescribed by Section 4080 of the Kentucky Statutes of 1903, *supra,* and in our opinion the provision is mandatory" (The court quoted as authority for this proposition the language of the Henderson Bridge case, heretofore quoted by us.—page 800).

These authorities show that a corporation which has been assessed upon its franchise, or intangible property, under this statute, has a right to know *by what method, or process,* that assessment was made; and if it be ascertained that the process followed was one not authorized by the statute, then the corporation has a right to have it adjudged null and void.

In the case at bar, the complaining corporation is a railroad company, having lines of railroad both in and out of Kentucky, having lines in fact in thirteen different States, the greater part of its mileage lying outside of the State of Kentucky, which is the taxing State involved. An examination of this statute shows that, as to corporations doing business both in Kentucky and out of Kentucky, the statute recognizes and provides for two different kinds, or classes, (1) a kind of corporation which has fixed "lines" along which it does business, such as a railroad company, a telegraph company, an express company, etc., and (2) another kind which does not do business along fixed lines, such as a surety company, like the one involved in the case last cited. And the methods provided for assessing the intangible property of these two kinds of corporations are fixed by two different sections of the statutes. §4080 provides the method for corporations which do not do business along fixed lines, expressly excepting from its provisions a class of corporations covered by the next section; and when we read the next section, 4081, we find that it does provide for corporations of the latter kind, such as railroad, telegraph, telephone, express, sleeping car, etc., companies. And reading these two sections we find that they differ from each other mainly in the process of *apportioning* to Kentucky a certain part of a total value, rather than in the method of fixing the total value. In §4080, covering corporations which do not do business along fixed lines, the apportionment is made on a basis of *receipts,* whereas,

in §4081, covering corporations doing business along fixed lines, the apportionment is made on a basis of *mileage*.

It is evident that there are three major steps involved in this process of fixing the value of the intangible property, taxable in Kentucky, of a corporation doing business and having property both in Kentucky and outside of Kentucky, and those three steps are (1) the fixing of the total value of the assets of the corporation, (2) the elimination of the value of the tangible assets, and (3) the apportionment to Kentucky. And in the case at bar it is the claim of plaintiff that the Board of Valuation and Assessment erred, as a matter of law, in each of these three particulars.

V.

Fixing the Total Capital.

There is no specific method prescribed by the statute for fixing the total value of the "capital stock," as it is called, or the total assets, as the court has construed this to mean, of the corporation involved. And the result of this has been, so far as the Louisville & Nashville Railroad Company is concerned, that the Board of Valuation and Assessment has always adopted that method which would produce the greatest value. Some times it has fixed the value of the company's total capital by what is called the "Stock and Bond Plan," that is, by adding the value of its stock and the value of its bonds together, and accepting the result as the value of its total

capital. In other years it has rejected this so-called "Stock and Bond Plan," and has adopted what is called the "Capitalization of Income Plan," that is to say, it has capitalized at a certain percentage what it believed to be the net income of the company, and has taken this as representing the total capital. And in the particular year involved in the present case, the latter process, the "Capitalization of Income Plan," was adopted.

While we do not agree with the Board as to the amount which it assumed as the net income of the Louisville & Nashville Railroad Company for the year involved ($16,631,301), which was the year ending June 30, 1912 (though the tax is called the tax of 1913), yet we shall not ask the court to consider the details of the process by which the net income was reached. There are, however, two matters directly involved in the fixing of the total capital, after the net income had been reached, to which we do call the court's attention, and in which we insist that error was committed, to-wit:

(A) In the manner of deducting non-taxable assets.
(B) In the rate of percentage used in capitalizing the income.

A.

MANNER OF DEDUCTING NON-TAXABLE ASSETS.

The Court of Appeals of Kentucky, and this court, having both held that the tax under consideration is simply an intangible property tax, therefore, of course, if among the assets of a corporation going to make up its to-

tal, there were some which were non-taxable, it was necessary to deduct these before arriving at the taxable capital. (Marion National Bank v. Burton, 121 Ky. 876.) The Board recognized this, and undertook to make this deduction, but we submit that it did this "in an improper mode or manner."

§4085 of the Kentucky Statutes is as follows:

> "The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person, except that, when legally called on, the chief officer shall report a full statement of the property of such corporation for taxation, and, for a failure, shall be subject to the penalties in this article provided; *and so long as said corporation pays the taxes on all its property of every kind, the individual stockholders shall not be required to list their shares in said corporation.*"

And the Court of Appeals of Kentucky, in Commonwealth v. Fidelity Trust Co., 147 Ky. 77, in an elaborate opinion construing that section of the statutes, reached and expressed the following final conclusion:

> "We have endeavored to so state the authorities and their relation to this case as to avoid future confusion upon the subject. It is just to the rights of established property that the whole involved subject should be understood once for all. The conclusions reached are easily understood, *i. e.*, that the holders of shares of stock in domestic or foreign corporations, whether franchise or non-franchise in nature, need not list nor pay taxes upon their shares of stock when the corporation in which the stock is held has paid all taxes due from it, and assessable against it, upon its property located in the State of Kentucky, whether that property be realty, person-

alty, tangible or intangible, or franchise, in nature" (page 84).

And, as a further practical matter in construing the statute, and in determining whether or not a stockholder can claim exemption of the stock in his hands from taxation within the terms of the statute, the court has held that in attempting to tax stock in the hands of a stockholder, the Commonwealth must make it affirmatively appear that it has proceeded against the corporation in which the stock is held, and is not able to make its tax, and "in the absence of such showing, the court will presume that the corporation did its duty by listing its property as required by law." (Commonwealth v. Steele, 126 Ky. 670, 675).

Manifestly, therefore, to the extent that the Louisville & Nashville Railroad Company held the stock of other corporations having property in Kentucky and paying taxes of any kind thereon in Kentucky, this stock, in the hands of the Louisville & Nashville Railroad Company, was non-taxable; and it was necessary to deduct the value of any such stock from its total capital, previously ascertained.

As said before, the Board recognized this proposition as sound, and did make a deduction, but we insist it did not make the deduction properly.

The way the Board made the deduction was this: It had fixed the total capital of the company, for the year involved, by capitalizing at 6% its net income, which net income it fixed at $16,613,301.00 (Rec., 56). Then, as a means of deducting the non-taxable properties, it picked

out the income, or dividends, which these non-taxable securities had paid, and deducted these from the total net income previously ascertained, and capitalized the balance (Rec., 56). And the Board insists that this was a proper way to deduct the non-taxable properties from the total of the company's properties. The amount of income thus deducted from the previously ascertained total income was $878,147.00, which, capitalized at 6%, represents a capital of $14,469,113; so that the Board's process was equivalent to deducting that sum from what would otherwise have been the total capital, thus leaving the balance as the taxable capital.

On the other hand, the company insists that what the Board should have done was to ascertain the total capital, in any legal way, and then to deduct from that total capital the actual value of the non-taxable properties embraced therein; and it shows, without contradiction, in the evidence that the actual value of these non-taxable securities, for the year in question, was $30,761,799.35. (Exhibit Geo. W. Lamb No. 5, Rec., 393, 394; testimony of C. O. Bradford and Exhibits 1, 2, 3, Rec., 310-314; testimony of W. L. Mapother, Rec., 314-319.)

Of course the Board's method of deduction had the effect of simply giving a value to, and therefore deducting, such stock in other corporations, as *paid dividends;* whereas the company insisted that much of its stock, which it thus held, although it paid no dividends, or only low dividends, had large value by reason (among others) of the control which the ownership of the stock gave over other lines of railroad, with the result of largely

adding to the income of the company as a whole, though possibly this result appeared in the receipts of other parts of the system than the particular line in which the stock was held, these increased earnings being capitalized and thus adding to the total capital; so that while the stock was valuable, and made its value appear in the manner indicated, yet, as the stock itself did not pay dividends, at least every year, or only a low rate of dividend, the effect of the Board's course was to deduct nothing, or only a very inconsiderable amount, on account of this non-taxable property.

A specific illustration will probably make this plainer than general statements. The Louisville, Henderson & St. Louis Railway is a line of road extending from Louisville, Ky., about 150 miles to Henderson, Ky., where it unites with a line of the Louisville & Nashville Railroad, running from Nashville by way of Henderson, Ky. (where it crosses the Ohio River), to St. Louis. The Louisville & Nashville Railroad Company owns a majority of the stock of the Louisville, Henderson & St. Louis Railway, and in this way controls the operations of that road. By this means the Louisville, Henderson & St. Louis Railway is made practically a link in the line of the Louisville & Nashville Railroad from Louisville to St. Louis, and very greatly decreases the distance between the two places, as the line of the Louisville & Nashville Railroad from Louisville via Guthrie, Ky., to St. Louis is very circuitous. All of the passenger traffic, and a substantial amount of the freight traffic, between Louisville and St. Louis, by way of the Louisville & Nashville Railroad, and

its connections, pass over this Louisville, Henderson & St. Louis Railway. And in this way the earnings of the Louisville & Nashville Railroad Company on the line *between Henderson and St. Louis* are largely increased by business which the Louisville & Nashville Railroad Company would probably not get at all but for this connection. These increased earnings are thus secured through the ownership by the Louisville & Nashville Railroad Company of the stock of the Louisville, Henderson & St. Louis Railway, which thus has a large value. And these increased earnings are in turn capitalized in arriving at the total capital of the company. Yet this stock pays no dividends, and, therefore, when the Board deducted from the company's total capital only the capitalization of the dividends from the non-taxable securities, it deducted nothing for the Louisville, Henderson & St. Louis Railway stock, which undoubtedly was of great value and added much value to the Louisville & Nashville Railroad Company's total capital, but which value appeared, not in the shape of dividends on the stock, but in an increased business of the system.

This stock has a value, which can be ascertained, and which is shown by this record to be $519,788.73, being what it actually cost the Louisville & Nashville Railroad Company (see Mapother's testimony, Rec., 315, and Exhibit Geo. W. Lamb No. 5, Rec., 393, 394), yet, nothing at all was deducted by the Board from the Louisville & Nashville's capital on account of this stock. The Board's idea of course was that as it had reached its estimate of total capital by the capitalization of income, therefore, if it deducted from the total income so much

thereof as came from the non-taxable properties, it was in effect deducting the non-taxable properties. But it simply overlooked the fact, as illustrated by the case we have just given, that stock in another railroad company might have a large value, appearing in increased business and increased profits on other parts of the system of the company holding it, although the stock itself might not pay a dividend. Mr. Geo. W. Lamb, a witness for plaintiff, testified before the court that in his judgment, and according to calculations he had made, there were included in the corporate income which the Board capitalized "net earnings from traffic originating or terminating on, or interchanged with, the Louisville, Henderson & St. Louis Railway, which, when capitalized at 6%, represented a property value of more than $1, 535,000.00" (Rec., 480).

We will not go into the details of this matter as to other properties of this kind held by the Louisville & Nashville Railroad Company, as it is the principle we desire established, and that principle is illustrated by the example we have given. We will mention, however, one other piece of property of this kind, because it was specially mentioned by the Board in refusing to make any deduction for it, and that is the Louisville & Nashville Railroad Company's ownership of the securities of the Lexington & Eastern Railroad Company. The Louisville & Nashville Railroad Company owned at the time of and for many years prior to, the assessment complained of, the *entire capital stock* and *all the bonds* of the Lexington & Eastern (Rec., 318). The stock alone

cost the Louisville & Nashville Railroad Company $915,-253.00; and when it acquired all the stock, it assumed the liability upon the bonds, and then bought up the bonds and advanced funds for the construction of extensions, additions and betterments, thus making the company's total investment in this line $6,991,145.35 (Rec., 315). The Louisville & Nashville Railroad Company thus in fact owns that road. The organization of the company as a separate corporation has been maintained however, and it is thus operated; and it (the Lexington & Eastern) pays taxes to the State, and the subdivisions thereof, both on its tangible and its intangible property, including what is thus called its franchise. Its value to the Louisville & Nashville Railroad Company is very great. The latter company derived for the year in question a direct income of $70,953.33 from it (Rec., 477), as well as what might be called an indirect income, or advantage, of the character heretofore described with reference to the Louisville, Henderson & St. Louis Railway. Yet because the stock (which had cost nearly $1,000,000.00) did not pay a dividend, the direct income being paid nominally as interest on the bonds, and because the other benefits in increased traffic and profits to the rest of the system did not appear as dividends on the stock, the Board made no deduction at all from the plaintiff's total capital by reason of its ownership of these securities in the Lexington & Eastern Railroad; and thus taxes were paid to the State on the property, both tangible and intangible, of the Lexington & Eastern Railroad in the form of taxes paid directly by that company, and then taxes are again

paid on the same property, both tangible and intangible, by the Louisville & Nashville Railroad, which is the owner of it, no deduction whatever being made from the Louisville & Nashville Railroad Company's capital on this account, simply because the stock which it owns in the road does not pay a dividend.

We, therefore, submit that the Board's method of applying a principle which it concedes to be true, namely, that such assets as the Louisville & Nashville Railroad Company owns which are non-taxable by the law of Kentucky, must be eliminated from its total capital, in order to arrive at its taxable capital, is an improper method of making the elimination, because it does not in fact make the elimination to which the company is by law entitled.

B.

INTEREST RATE USED IN CAPITALIZATION.

The Board having fixed the net income of plaintiff at $16,613,301.00, then deducted the income from non-taxable securities, as just explained, which it fixed at $878,-147.00, thus leaving a balance of $15,735,154.00, which it thereupon capitalized at 6%, thus reaching a total of $262,252,566.00. This is the allegation of the answer as to the way the latter amount was reached (Rec., 56); and by stipulation that is admitted to be correct (Rec., 101, being Sec. 5, Subsec. J of Stipulation). The plantiff insists that the Board capitalized this income at too low a rate of interest. Of course, if it had used a higher rate, the total capital reached would have been lower. The District Court was of opinion that this was a matter over

which it had no control, but was a matter to be determined by the Board. We submit that the court was in error in this. The Board capitalized this income at 6%, simply because 6% is the legal rate of interest in Kentucky. It must be remembered, however, that in taking the first step in its process of finding the taxable value of plaintiff's property in Kentucky, it first ascertained the value of all plaintiff's property, *wherever situated;* and, as heretofore said, *the majority of its mileage is outside of Kentucky,* lying mainly in Southern States, where the rates of interest are higher than in Kentucky, as this court judicially knows, and as this record expressly shows. For example, take the State of Alabama, and the value of plaintiff's property in that State. The legal rate of interest there is 8%. Now, if the use of $100.00 of money or property in that State for one year is worth $8.00, then property in that State, which only yields an income of $8.00 per year is in fact worth not over $100.00, which is the capitalization of $8.00 at 8%. It is not worth $133.33, which would be the capitalization of $8.00 at 6%, and we submit, therefore, that, as a matter of law, if the Board adopts the plan of capitalization of income, in order to arrive at the value of property, it must not use for this purpose simply the legal rate of interest in Kentucky, when the court knows judicially, and the record shows, that the rate of interest in other States, wherein the larger part of the property lies, is higher than the rate of interest in Kentucky.

Mr. Lamb, a witness for plaintiff, computed what he called "composite percentage," arrived at by taking the

Louisville & Nashville Railroad Company's mileage in each of the States, through which it operates, multiplying that by the legal rate of interest of that State, and dividing the total mileage operated into the total interest mileage, thus arriving at the figure 6.624% (Rec., 321). And we submit that at least this high a percentage should be used, though in fact in such a hazardous enterprise as that of railroading, a higher rate of interest than either 6% or 6.624% should be allowed, and 8% is no more than fair.

VI.

Elimination of Tangible Property from Total Capital.

After having arrived at what the Board fixed as the value of the total capital, or total assets, both tangible and intangible, and wherever situated, of the Louisville & Nashville Railroad Company, the Board's next step was to apportion a certain part of that total value to Kentucky, thus assigning to Kentucky a certain part, both of the tangible and intangible assets; from which sum, representing both the tangible and intangible assets, the Board then deducted the assessed value of the tangible assets in Kentucky (see interrogatory "m" by plaintiff to the Board, Rec., 283, and the Board's response to that Interrogatory, Rec., 304).

We submit that this process was erroneous; that it should have been reversed; that the Board, having arrived at the total capital of the company, to-wit, its total assets, tangible and intangible, should then have deducted

the entire tangible assets of the company, so as to leave a balance representing the value of the entire intangible assets of the company, and then should have appropriated to Kentucky a proper proportion of these intangible assets. It was expressly so decided by the United States Circuit Court of Appeals for the Sixth Circuit in Coulter v. Weir, 127 Fed. 897, in an opinion by Judge Lurton, afterards Mr. Justice Lurton, to which we will presently refer. It will be remembered that the tax under consideration is *a tax upon the intangible property of the corporation,* and that the duty of the Board of Valuation and Assessment is to assess the value of this intangible property, upon which this tax is to be levied. There are elaborate provisions in the Kentucky Statutes, not necessary here to quote in full, for the taxation of the *tangible property* of railroad companies by an entirely separate tribunal, to-wit, the Railroad Commission of Kentucky (Kentucky Statutes, Sections 4096 to 4104, both inclusive, which are quoted in the bill of complaint—Rec., 26-28), which sections carefully provide for reports by the railroad companies to the Auditor of the State which are to be laid before the Railroad Commission, and provide how the assessment shall be made. But the tax involved in the case at bar is a tax upon the *intangible* property, called franchise, and the duty of the Board of Valuation and Assessment is to value *that property.* In other words, the Railroad Commission values and assesses the tangible property, and the Board of Valuation and Assessment values and assesses the intangible property of railroad companies.

In the Henderson Bridge case, heretofore referred to more than once, and which gave very elaborate consideration to this tax, the Court of Appeals of Kentucky, in language heretofore quoted, in speaking of the terms used in this statute, speaks of the terms, intangible property, as being "used as synonymous with franchise" (99 Ky. 639).

And this court, when that same case was brought to it by writ of error, 166 U. S. 150, where the same assessment was involved, spoke of it constantly as an assessment upon the intangible property of the corporation, using among other, the following language:

> "This was an action brought by the Commonwealth of Kentucky against the Henderson Bridge Company to recover the sum of $3,675.91, taxes levied against that company on *an assessment made of its intangible property* by the Kentucky Board of Valuation and Assessment for the year 1893." (Page 152.)

And then again:

> "The tax on the *tangible property* amounted to $2,762.08, and this, as we understand it, was paid by the company. The tax *on the intangible property* was $3,675.91, which the company refused to pay, whereupon this action was brought for its recovery." (Page 153.)

And then again, and still more emphatic, the following language:

> "The tax in controversy was nothing more than *a tax on the intangible property* of the company in Kentucky, and was sustained by the Court of Appeals, as consistent with the provisions of the Constitution of Kentucky in reference to taxation." (Page 154.)

Furthermore, the same statute came under review before this court in the case of Adams Express Company v. Kentucky, 166 U. S. 171, and it treated the tax in the same way. And in the opinion, after referring to §174 of the Constitution of Kentucky as to the taxation of corporations, then used this language:

> "But this does not prevent *intangible* property from being taxed, and the tax mentioned in Section 4077 is not an additional tax upon the *same* property, but on *intangible property* which has not been taxed as tangible property." (Page 181.)

And in this last mentioned case, the court used language directly applicable to the question we are now considering, to-wit, as to whether or not the deduction of the tangible property from the total capital should be the second step in the process, the court saying:

> "But taking the whole act together, and in view of the provisions of Sections 4078, 4079, 4080 and 4081, we agree with the Circuit Court that it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, *the value of the tangible property be deducted,* and the value of the intangible property thus ascertained be taxed under these provisions; and as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the State, that their intangible property should be assessed on the basis of the mileage of their lines within and without the State.

> "But from the valuation on the mileage basis the value of *all tangible property* is deducted before the taxation is applied." (Page 180.)

But the most direct authority upon this proposition, arising under these Kentucky Statutes, is the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, in Coulter v. Weir, 127 Fed. 897, in which the language of the court by Judge Lurton is so directly applicable to points we are considering in the case at bar, that we quote from it somewhat at length, as follows:

> "2. So far as the bill attacks the constitutionality of the law under which the Board of Valuation and Assessment professed to proceed, either because the law is repugnant to the commerce clause of the Fourteenth Amendment to the Constitution of the United States or to the provisions of the Constitution of Kentucky, it is not well filed, inasmuch as all of these questions were decided in favor of the validity of the law in Adams Express Company v. Kentucky, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960. In that case the statute was held as not imposing a tax upon the technical franchise of the companies included therein, but upon the intangible property of such companies as a unit. 'The legislative intention,' said the court, 'is that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety, the value of the tangible property be deducted, and the value of the intangible property thus ascertained be taxed under those provisions; and, as to railroad, telegraph, telephone, express, sleeping car, etc., companies, whose lines extend beyond the limits of the State, that their intangible property should be assessed on the basis of the mileage of their lines within and without the State. But from the valua-

tion on the mileage basis the value of all tangible property is deducted before the taxation is applied.' *That the act does not contemplate that this additional tax shall be imposed upon property, either within or without the State, which is otherwise taxable as* TANGIBLE *property, is plain.* The additional tax is therefore a tax upon the *intangible* property of the companies within the act. The scheme is the same in respect of both domestic and foreign corporations and companies. If the lines of any such corporation or company extend beyond the limits of the State, the taxation is in the proportion which the mileage in the State bears to the total mileage of the company. If the lines were *wholly* within the State, the plain direction is that the value of any tangible property within the State is to be deducted as being subject to a different mode of taxation. This Kentucky Act, like the Ohio Act construed in Adams Express Co. v. Ohio and Sanford v. Poe, cited below, proceeds upon the general principle that it is competent as to such companies, having lines extending through more than one State, to value their property 'as a unit for purposes of taxation, taking into consideration the uses to which it was put, and all the elements making up the aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State without violating any Federal restriction.' Adams Express Co. v. Ohio, 165 U. S. 194, 220; Western Union Tel. Co. v. Mass., 125 U. S. 530; Pullman Palace Car Co. v. Penn., 141 U. S. 18; Sanford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641. Sections 4078, 4079, and 4080 make it the duty of the companies mentioned in the law to furnish certain data by which the value of the intangible property of such companies may be ascertained, and prescribe the manner in which the Board is to proceed in the valuation. When the value of the 'capital stock' is ascertained—meaning thereby every element con-

> tributing to value, whether tangible or intangible—the direction of the act is that from this shall be taken or deducted the value of all tangible property otherwise taxable. This method is as applicable to companies and corporations organized under the laws of other States as it is to those existing under the laws of Kentucky. Neither is the injunction in reference to a deduction of the value of tangible taxable property from the gross value of the whole corporate property *limited* to such as is situated within the State of Kentucky. *If tangible property having a situs outside of the State be included in the valuation of the company's intangible property, the purpose of the law, being to tax only intangible property, is defeated. We therefore read the act, as the Supreme Court seems to have read it in Adams Express Company* v. *Kentucky, as requiring the deduction of tangible property from the gross value of all corporate assets, whether such tangible property be within or without the State.* (Pages 907, 908.)

The failure of the Board in the present case to deduct the *entire tangible property* of the corporation from its total capital, before attempting to apportion to Kentucky its share of the value of the *intangible property*, which was all it had to do, lead to a most remarkable result, as shown by the official statement of the Board, showing the reasons for its final action, all of which is set forth in the affidavit of the Auditor, the Chairman of the Board. In that statement it is shown that the Board fixed the total capital stock, including, as heretofore explained, all the property of every kind, tangible and intangible, wherever situated, at $262,252,566; that it fixed the *entire value of the tangible property*, wherever situated, at $177,038,113.00; that it then deducted this value of the

tangible property from the total, and thereby found "the value of the intangible property of the Louisville & Nashville Railroad Company within and without Kentucky" to be $85,214,453.00 (Rec., 575). Now, remember, that the Board thus actually found the value of the *total intangible* property of this plaintiff to be $85,214,453.00. Then, assuming Kentucky's proportion of the mileage of the Louisville & Nashville Railroad Company to be what the Board took it to be (which we will presently show was altogether erroneous and far too large), to-wit, 35.15%, *Kentucky's proportion of this intangible property* would be $29,952,880.22; or even giving to Kentucky a proportion of the intangible property which it is claimed that the Kentucky *gross income bore* to the *total gross income* (of which proportion there is no evidence, and which process, furthermore, was, as the court below decided, Rec., p. 119, absolutely unauthorized under the statute), this proportion of gross income being claimed to be 38%, *this proportion of the intangible property* would only give to Kentucky $32,421,492.00. And yet the Board, by its peculiar process, actually fixed the value of this intangible property, to be taxed in Kentucky, at $45,658,630.00 (Rec. 575), which *exceeds one-half of all appellant's entire intangible property belonging to its whole system* ($85,214,453.00) and is *more than $13,000,000.00 in excess of the proportion of the intangible property reached by apportioning it in Kentucky on the pretended income basis, and $16,000,000.00 more than the proportion of the intangible property apportioned to Kentucky on the mileage basis, assumed by the Commis-*

sion, each of which, as we will presently show, assigned to the State of Kentucky very greatly more than it was entitled to under the statute; all of which shows that in its valuation and assessment of the franchise or *intangible* property of the plaintiff the Board has included many millions of dollars of value of the *tangible* property in Kentucky and out of Kentucky.

Yet the District Court upheld this palpably erroneous method of supposedly eliminating the tangible property. And this is one of the errors complained of.

VII.

Kentucky's Proportion of Plaintiff's Assets.

Whether the apportionment to Kentucky should have been of the entire assets of plaintiff (called total capital) or simply of the intangible assets, the Board made a radical departure from the language of the statute, and from the language as expressly construed by the Court of Appeals of Kentucky, in making the apportionment which it did make in the case now under consideration.

It would be difficult to explain how the Board made this apportionment except by quoting its own language in explanation thereof which is as follows (Rec., 574-575):

> In arriving at the basis for estimate of value of the capital stock or property of respondent, the Board has considered the cost of construction of road and equipment and cost of reproduction thereof, the real value of its stocks and bonds and the gross and net earnings thereof within and without Kentucky, and all other matters appertaining thereto as shown

by the proof, that would assist the Board in arriving at the fair cash value thereof, and upon consideration of all the foregoing and after hearing the argument of counsel for respondent, and after having taken time to thoroughly consider all matters brought out in the hearing, it is now adjudged and determined by the Board of Valuation and Assessment of Kentucky that the fair cash value of the total capital stock of the L. & N. R. R. Co. is . . $262,252,566

That the proportion of the capital stock in Kentucky on the mileage basis 35.15 is 92,181,776

But the Board found that the excess in Kentucky over this sum as shown by the proportion of the capital stock in Kentucky on the *gross income basis* is 7,472,199

And that the excess value found in Kentucky by using the *net income ratio is*. 10,096,624

Following the plan suggested by Judge Cochran in his opinion recently handed down in the case of L. & N. Railroad Company v. Bosworth on hearing for a preliminary injunction, we ascertained the excess value as follows:

The entire value of the *tangible* property of the L. & N. R. R. Co. within and without Kentucky as shown by the report to the Auditor is $177,038,113

The total value of the capital stock as found by the Board is 262,252,566

From which deduct. 177,038,113

And the value of the *intangible* property of the L. & N. R. R. *within and without Kentucky* is found to be. 85,214,453

The mileage proportion of the *tangible* property 35.15 62,228,896

The gross income proportion of the *intangible* property, 38 32,421,492
Value of capital stock in Kentucky..... 94,650,388

Therefore, the Board of Valuation and Assessment places the excess value in Kentucky over the value found on the mileage basis at $2,318,224, and fixes and determines the value of Kentucky's proportion of the entire capital stock of the respondent at $94,500,000, but to be conservative, and out of an abundance of caution to the end that no injustice may be done respondent in this State, the Board has considered less than 80 per cent of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent, and it is now ordered that the value of the capital stock of the L. & N. Railroad Company in Kentucky for the year 1913 be fixed at $75,159,402, which, in the opinion of the Board, is less than 80 per cent of its fair cash value, and from this sum there is deducted the assessed value of the tangible property, to-wit, $29,500,772, and the remainder, to-wit, $45,658,630, is adjudged to be the value of the franchise of the L. & N. Railroad Company in Kentucky subject to taxation for the year 1913. (Rec., 574-575.)

Thus it will be seen that the Board assigned to Kentucky what it called the "mileage proportion" of the tangible property (which the Board erroneously fixed on the basis of *operated* mileage alone at 35.15%) amounting to $62,228,896.00 and assigned the "gross income proportion" of the intangible property (which the Board fixed at 38%) amounting to $32,421,492.00 which two figures added together make $94,650,388.00, which would appear to be the value of the capital stock in Kentucky.

But as the Board had previously shown by a figure given above "that the proportion of the capital stock in

Kentucky on the *mileage basis* (35.15%) is $92,181,776.00, it concludes that there is an excess of value in Kentucky above that reached by assigning value to Kentucky simply on the mileage basis, but it does not take this excess to be exactly the difference between $94,650,388.00 (reached by combining the *mileage* proportion of the *tangible* property, and the *gross income proportion* of the *intangible* property) and $92,181,776.00 (which is the mileage proportion of the total, tangible and intangible), but it fixes this excess at $2,318,224.00, which is just enough of an excess above $92,181,776.00 to bring the total up to the *even figure* of $94,500,000.00. Then having reached the latter figure, which it says is "the value of Kentucky's proportion of the entire capital stock of respondent," it then says that "to be conservative and out of an abundance of caution to the end that no injustice may be done "it reduces this value to "*less than 80%* of that which it believes to be the fair cash value of Kentucky's proportion" and fixes the same at $75,159,402.00. Eighty per cent of the even figure $94,500,000.00 would have produced another even figure of $75,600,000.00 and it almost strains credulity to the breaking point to try to believe that the odd figure fixed by the Board of $75,-159,402.00 as Kentucky's proportion of the total capital was reached in any such way as is above described. But we will refer to that matter in another part of this brief, in discussing another point, and for the present we will assume for the sake of argument that the foregoing is a frank statement by the Board of what it did, and will consider its validity on that basis.

It will be observed, as mentioned above, that what the Board did was to divide the total capital into a certain amount for tangible property and a certain amount for intangible property and then to apportion the tangible property to Kentucky on a so-called mileage basis of 35.15% and the intangible property on a so-called gross income basis of 38%.

We submit that under the statute in Kentucky (Sec. 4081) governing the subject of apportionment there is absolutely no authority for making any apportionment on a gross income basis. And we further submit that the so-called mileage basis which the Board used for the tangible property and which it fixed at 35.15% is not at all the mileage basis which the statute prescribes.

What the Board means in this connection by mileage basis is the proportion which the *operated* mileage in Kentucky bears to the total *operated* mileage of the company, and the Board excludes from consideration what is known as the *controlled* mileage either in Kentucky or out of Kentucky by which is meant the mileage of roads which, though controlled by the Louisville & Nashville Railroad Company by ownership of stock, are not actually operated by the Louisville & Nashville Railroad Company. The mileage proportion *fixed by the statute* is described as follows:

> "The said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines *operated, owned, leased or controlled* in this State, bears to the total length of the lines *owned, leased or controlled* in this State and elsewhere, shall

be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State" (Kentucky Statutes, §4081—see Appendix).

And it is shown in the record that if the mileage thus described by the statute, to-wit, the mileage "operated, owned, leased or controlled" is taken into consideration, Kentucky's proportion thereof is only 24.6901%, and that it is necessary to leave out entirely this "controlled" mileage in order to reach the Board's percentage of 35.15%. (Rec., 322, 483-485.) And the Board itself, in answer to an inquiry from the company, stated that in reaching its so-called mileage proportion, it excluded from consideration this mileage controlled by the ownership of stock, but which was not operated by the Louisville & Nashville Railroad Company (Rec., 304).

That the so-called "controlled" mileage is to be considered in arriving at this proportion is not only stated in express and unmistakable terms by the statute itself, but the Court of Appeals of Kentucky has expressly decided that mileage of roads controlled by the ownership of capital stock is to be considered in making this apportionment. The direct question arose in the case of Commonwealth v. Louisville & Nashville Railroad Co., 149 Ky. 829, where the controlled mileage, that is the mileage of roads controlled by the ownership of stock, had been taken into consideration by the Board of Valuation and Assessment and where in a subsequent proceeding by the Commonwealth it was insisted that this was improper, and in which the Court of Appeals said:

> "The statute requires that the railroad company shall report to the Auditor of Public Accounts its entire lines 'operated, owned, leased or controlled' in and out of the State. If the railroad company owns a majority of the stock of another company, so that it may elect its directors and dictate its policy, *there can be no doubt that it controls it within the meaning of the statute.*" (Page 838.)

It seems to us, therefore, indisputable, under the plain terms of this statute and under the statute as expressly construed by the Court of Appeals of Kentucky, that the exclusion of the Board in the present case of what is called the "controlled" mileage of the company in determining the proportion upon which it would assign to Kentucky its part of the total capital was not in accordance with the statute and was, therefore, unauthorized. And as said before, if this controlled mileage had been considered, the result would have been that the percentage of the total apportioned to Kentucky would have been 24.6901% instead of 35.15%, which, of course, would have made a very great difference and would have assigned to Kentucky a very much smaller part of the total for purposes of taxation.

It is insisted, however, that the Board is not controlled in its findings by the language of the statute above quoted; that it is only required to "*consider*" the proportion named in the statute, but is not required to *use it* in reaching a result; that having considered the proportion of lines "operated, owned, leased or controlled," it can then reject the result reached by such a process and accept the result reached by making an apportion-

ment on the basis simply of the mileage "operated," or can *reject the mileage altogether* and accept the result reached by making the apportionment on the basis of the proportion between the "*gross income*" derived from the business in Kentucky and the total gross income of the corporation. And, as seen above, this is the process which the Board actually adopted, that is to say, it apportioned the tangible property on the basis of the *operated* mileage and it apportioned the intangible property on the basis of gross income. For while the Board went through the form of first apportioning the total (including both tangible and intangible property) on the operated mileage basis, and then of apportioning the intangible property on the gross income basis, and then adding the difference between these two results to the total first reached, of course this is exactly the same thing as if the Board in the first place had apportioned the tangible property on the mileage basis and the intangible property on the gross income basis.

But we submit that the statute can not be thus lightly put aside, and the only manner of apportionment which it describes be rejected, and an entirely different basis or entirely different bases be adopted by the Board at its pleasure.

The general scheme of the statute is plain, although its details are awkwardly expressed and obscure. The following is the general plan:

§4077 describes the character of corporations required to pay a franchise tax, and names the officers of the State

who shall constitute the Board of Valuation and Assessment and fix the value of the franchise;

§§4078 and 4079 provide what facts shall be reported to the Auditor for the benefit of the Board, and provide in a general way for the fixing of the *total capital stock.* These two sections *say nothing about how the apportionment shall be made,* where business is done in more than one State; and

§§4080 and 4081 are intended to cover, and do cover, the subject of *apportioning* the total so as to determine Kentucky's part. While each of them *refers* to fixing the total capital, yet this is only as *introductory to the matter of apportionment.* The manifest purpose of these two sections was to provide for arriving at Kentucky's share, in other words, for the matter of apportionment. And of these two sections the first of them (4080) refers generally to foreign corporations, *except as provided in the next section* (4081), and covers only such corporations as, for example, the American Surety Company (see Hager v. American Surety Co., 121 Ky. 791), whereas the next section (4081) covers a specific class of corporations, especially named therein and which are expressly excepted out of the provisions of §4080, including railroad companies and other companies *doing business along fixed lines,* "which extend beyond the limits of the State."

As said before, the very purpose of this Section 4081 was to provide, not the manner of fixing the *total capital* (for on that subject the section simply says "said Board will fix the value of the capital stock, as hereinbefore pro-

vided,") but it was for the purpose of providing how the total capital, when once fixed, should be *apportioned,* so as to give Kentucky its proper part. We think it is important to remember that *the real purpose of this whole section was to provide a manner of apportionment;* because, when we remember this, we can not believe that the Legislature ever meant to leave it in the absolutely indefinite condition in which it would be left by the interpretation sought to be put upon it by defendants, by which interpretation, nothing at all is fixed.

This history of this §4081 is both interesting and instructive. This statute, of which this section is a part, was adopted in 1892 (Kentucky Session Acts 1891-92-93, pages 277, 302) and was subsequently amended in 1893 during the same session of the Legislature (which was a very long one, being the first session following the adoption of a new Constitution) by an Act approved June 9, 1893, (Same Session Acts, pp. 981, 991). The amendment of the section now under consideration was made by the *insertion of three words.* We here quote the statute as amended in 1893, putting in parenthesis the three words constituting the amendment, so that the court may see how the statute read before it was amended and how it read after its amendment. We quote as follows:

> "If the corporation organized under the laws of this State, or some other State government, be a railroad, telegraph, telephone, express. sleeping, dining, palace or chair-car company or a corporation performing any other public service, the lines of which extend beyond the limits of this State, the said Board will fix the value of the capital stock, as hereinbe-

fore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be (*considered in fixing*) the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of line in this State, less the value of any tangible property assessed or liable to assessment in such county, city, town or taxing district" (Kentucky Session Acts 1891-92-93, p. 991).

The act was subsequently further amended in a matter not important in this litigation by adding at the end of the section a provision covering a case not theretofore provided for, to-wit, the case of a corporation organized in Kentucky, but having no property in Kentucky, such as the Southern Pacific Railway, and the statute as thus finally amended is §4081 of the Kentucky Statutes (see Appendix).

This section we thus see was intended to prescribe a mode (1) of apportioning the property to be taxed *between States* so as to arrive at Kentucky's part, and then (2) of apportioning Kentucky's part *between the counties and other taxing districts in Kentucky.* And manifestly the Legislature meant to adopt the same mode of apportionment in each instance. As to the apportionment of Kentucky's part of the franchise *between the subdivisions of Kentucky,* the situation is absolutely plain

and the language absolutely mandatory. It is required to be upon the mileage basis, as therein described. And the Court of Appeals of Kentucky has expressly so held—Southern Railway v. Coulter, 113 Ky. 657. And so in the matter of apportionment *between States*, the same rule was evidently intended to be adopted; and as the statute originally read this purpose was plain, because it said that mileage proportion as described in the statute "shall be the value of the corporate franchise of such corporation liable for taxation in this State." But there was a manifest mistake in the use of the language in expressing the intended purpose, because the total capital to be apportioned embraced both tangible and intangible property, and therefore a mileage proportion of that total capital would also embrace both tangible and intangible property; but the franchise was only intangible property, and therefore it could not be that a proportion of the *total capital* should be the *corporate franchise* to be taxed, for manifestly it was necessary to make at some time a *deduction of the tangible property*, in order to arrive at the intangible property or franchise. And it was for the manifest purpose of correcting this plain mistake in language that the amendment was passed; and it was evidently thought that instead of adding a lengthy provision as to deducting the tangible property, which the court will see would have required a considerable change in the phraseology, the whole thing could be corrected by simply inserting the words "considered in fixing," just ahead of the words "the value of the corporate franchise." Evidently the thought in the minds of the framers of the statute was,

not to abandon the method for making the apportionment, not to leave the whole subject absolutely uncontrolled (when the entire purpose of the section was to fix a method of apportionment) but to correct the mistake in phraseology, just pointed out, by the insertion of the words "considering in fixing," so as to make the apportionment *a step in the process of fixing the corporate franchise.* In other words, the language, as originally written, provided that the apportionment should be the value of the corporate franchise, whereas, it was intended by the Legislature to be a *step* in fixing the value of the corporate franchise. The purpose of the amendment was, not to abandon the process which the whole section was adopted to provide, but merely to correct an inaccuracy of expression.

This construction gives the statute a consistent meaning throughout; it establishes the mileage rule of apportionment between States as well as the mileage rule of apportionment between the counties, cities, towns, and taxing districts of the State; and no reason can be given why the same rule should not apply. If it be suggested that part of the tangible property of a road in one State may be more valuable, per mile, than the part of the road in another State, or that the business done in one State may be more valuable than the business done by the same road in another State, the same thing can be said as to the tangible part of the road or the business done by the road in one *county* of the State, as distinguished from the tangible part of the road or the business done by the road in *another county* in the State,

and yet, as to the apportionment of the franchise between counties, cities, towns, and taxing districts in Kentucky, the rule of the statute is absolutely plain and absolutely mandatory, and the court has so held. (Southern R'y v. Coulter, 113 Ky. 675-6.)

On the other hand, consider the effect of giving to the section the construction contended for by the Board. The effect of it, so far as the apportionment of the capital stock between States is concerned, is *absolutely to provide no rule at all.* Defendants would read the section as if it simply means that the mileage proportion "shall *be considered* in fixing the value of the corporate franchise," but that *no effect* is required to be given to this consideration. In other words, the Legislature is put in a position of taking the trouble to insert in the statute a mandatory requirement that a certain thing *shall be considered,* without any requirement whatever that *any effect be given to it.* Under the interpretation placed by the Board on this section, the Board can comply with the statute by *considering* the mileage proportion, and find, for example, that Kentucky's part of the capital stock, on this basis, is only 25% of the total, and can then assign to Kentucky 50% of the total—in other words—give no effect to the mileage proportion but reject it altogether and take some other and totally different proportion. It is impossible to believe, and we submit that it is not the part of true judicial construction to say, that the Legislature intended so vain a thing when it *inserted an entire section for the sole purpose of making that provision in the statute.* It evidently intended to provide a method by which this apportion-

ment *must be* made, and we can not conceive of a law being enacted *mandatorily requiring* a certain process of calculation *to be considered,* but with absolutely *no requirement that any effect be given to the consideration.* And the result of such a construction is graphically illustrated in the situation we are considering in the case at bar, where the Board has absolutely disregarded the manner of apportionment provided by the statute and has made an apportionment on a totally different basis, using a proportion *based on income,* and having no reference to mileage, so far as the apportionment of intangible property is concerned, and using a proportion based only on *operated* mileage instead of the mileage of roads "operated, owned, leased or controlled," so far as the apportionment of the tangible property is concerned.

The court below, as we will hereafter show, held the construction we contend for of the language employed in Section 4081 to be sound and correct. (Rec., 116.) And the Court of Appeals of Kentucky has not placed any other or different construction thereon.

The main argument used against the method of apportioning on the mileage basis is that a road may have terminals of extraordinary value in one State, which it has not in another State, or, at least, that its terminals in one State may be out of all proportion to the average value of the line of road in another State. But where this situation exists, the proper process to be adopted, so as not to import these valuable terminals into a State where they do not exist, is to deduct the value of the terminals from the total capital and *apportion the balance,*

and not to practically abandon all idea of apportionment, or to make the apportionment so arbitrary as to have *no rational basis.*

Authorities on Apportionment.

In construing this statute it is helpful to consider what has been done heretofore in other States in the matter of apportioning the value of a railroad or other line property, and what has been decided on the subject of such apportionments by the courts of the country. One of the most thoroughly considered cases on this subject is what is known as the State Railroad Tax Cases of Illinois, 92 U. S. 575, in which Mr. Justice Miller delivered the opinion of the court. In that case the court considered especially the objection that was made to the apportionment, saying:

> "It is further objected that the railroad, track, capital stock and franchise is not assessed in each county where it lies according to its value there, but according to an aggregate value of the whole, on which each county, city and town collects taxes according to the length of the track within its limits." (Page 608.)

Then, having briefly stated the argument against such apportionment, the court said:

> "But as we have already said, the railroad must be regarded for many, and indeed for most purposes, as a unit. The track of the road is but one track from one end of it to the other and except in its use as one track, is of no value. In this track, as a whole, each county through which it passes, has an interest much more important than it has in

> the limited part of it lying within its boundary. Disregard by any means a few miles of this track within an interior county so as to cut off the connection between the two parts thus separated, and if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place, where its largest traffic centres. *It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole.*" (Page 608.)

Other cases in which an apportionment of the value of such properties on a mileage basis has been reviewed and sustained by the courts, are:

> Delaware Railroad Tax Case, 18 Wallace, 206.
> Erie R'y v. Pennsylvania, 21 Wallace, 492.
> Western Union Telegraph Co. v. Mass., 125 U. S. 530.
> Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18.
> Charlotte, etc., R. Co. v. Gibbs, 142 U. S. 386.

And the Court of Appeals of Kentucky has held that, whatever argument may sometimes be made against the apportionment of the *physical properties* of a railroad on a mileage basis, yet this is a peculiarly fair and appropriate mode of *apportioning franchises.* In Southern Railway v. Coulter, 113 Ky. 657, in which the whole subject of the apportionment of railroad franchises was reviewed, being a case in which all the railroad com-

panies in the State were involved, and in which every question that could be made on the subject was made, the court said:

> "Some comment has been made in regard to the apportionment of the taxes *in proportion to the length of the road or line* in the county. It is, however, manifest that the intention of the Legislature was that the franchise tax should be certified to the subdivisions aforesaid *in proportion to the mileage, without any regard to any other question, and such a rule is manifestly equitable.* For while it is true that the tangible property of the road differs in condition, *yet the franchise does not.* For instance, take the tangible property of the road in Frankfort for a distance of ten miles on the track towards Louisville, the total value of the tangible property would be worth much more than ten miles of the tangible property further on, but the *franchise* of the last named ten miles is worth as much as the *franchise* of the first named ten miles, because the whole of the track is necessary to make the franchise of any appreciable value; hence, it follows that the manner of certifying the value of the franchise, as required by the statute, is just and reasonable." (Pages 675, 676.)

We may remark, parenthetically, in this immediate connection, that the thought expressed in the quotation just made emphasizes the necessity, in apportioning the franchise between States, that the total value of all the tangible property be deducted from the total capital before apportioning the balance between the States. If it be true that the value of the tangible property is apt to vary on different parts of the line and that there may be valuable terminals in one State which do not exist in another State, and that in this way there may be danger

of importing property from one State into another by assessing on a strictly mileage basis, all this trouble can be avoided, in assessing the franchise, by deducting the total tangible property from the total capital stock, *thus putting the tangible property entirely out of consideration,* and then by apportioning what is left, to-wit: the franchise, upon a mileage basis. This suggestion is, of course, more pertinent to a subject which we have discussed in the preceding part of this brief, to-wit: the part devoted to the question of how and when to deduct the tangible property, but the thought arises so logically out of the suggestion made in the quotation from Southern Railway v. Coulter (*supra*), that we have referred to it again.

We believe our construction of the statute of Kentucky, to-wit: that it means to require the apportionment to be upon a mileage basis, not only between counties but between States, is unquestionably what the Legislature meant in adopting the statute; and that the Amendment of 1893 was not intended to *abandon this plan* but simply to *correct an inaccuracy in the phraseology* of the statute.

And we can not find that the Court of Appeals of Kentucky has ever approved any other method of apportionment than on the mileage basis, where the corporation involved had lines both in and out of Kentucky. There are some expressions of the court to the effect that this method of apportionment is not binding on the Board of Valuation and Assessment, these expressions, however, being where the assessment had, in fact, been made

on the mileage basis and was approved by the court, and where the statement that this was not obligatory on the Board was merely a *dictum*, because not necessary for the decision in the case.

We do not regard Southern Pacific Co. v. Commonwealth, 134 Ky. 410, as any exception to what we have said, because the facts of that case did not bring it within the provisions of Section 4081 of the statutes as to the apportionment of the franchises of corporations *having lines extending in and out of the State*. The Southern Pacific Railway *had no lines at all within the State*, and the question was how to assess the franchise in Kentucky of that particular company, which was created in Kentucky and yet had no line in the State and did no business in the State except merely to hold its stockholders' meetings. It was really a case not provided for by the statute at all, so far as apportionment was concerned. The *total capital stock* could, of course, be valued, as required by Section 4079, but the statute provided absolutely no rule of *apportionment* for such a case. In this situation, the Board, being left without any rule fixed by statute, simply made an apportionment or a valuation of the Kentucky franchise upon such basis as it considered fair, to which the company agreed. Thereafter, the Commonwealth attacked this assessment as arbitrary and void; but the court held that the Board had done all that it could do, and that there was no evidence of fraud or mistake, and simply the exertion of the Board's honest and best judgment *in a situation not provided for in the statute*, and, therefore, that the assess-

ment must stand. We repeat, therefore, that we do not regard this case as any exception to the proposition which we have stated, to-wit: that the court has never upheld any assessment of properties coming within Section 4081, except upon a mileage basis. Subsequent to the decision of the Southern Pacific case (*supra*), the section was amended so as to add a provision expressly covering a case such as that of the Southern Pacific, to-wit: the case of a domestic corporation which " has all its lines outside of this State." (Sess. Acts 196, pp. 88, 130.) But that is entirely a separate proposition and covers an entirely different situation from that of the class of property described in the original section, which is now the first part of Section 4081, covering the properties of corporations whose lines extend in and out of the State.

In the cases of Commonwealth v. Louisville & Nashville Railroad Company, 149 Ky. 829, and Commonwealth v. United States Express Company, 149 Ky. 755, there is nothing which contravenes anything we have said on this point.

In the first of them, Commonwealth v. L. & N. R. Co., 149 Ky. 829, there is nothing whatever in the opinion bearing on the question of apportionment except the last paragraph of the opinion, and that paragraph is favorable to our contention rather than otherwise. Therein the court says:

> "But there is an attempt to show that in this case the property sought to be assessed as omitted property was not included in the capital stock valuation, because the Board of Valuation and Assess-

ment, in fixing the capital stock, considered other roads controlled by the Louisville & Nashville Railroad Company, through stock ownership, but which were operated by their own organization. The statute requires that the railroad company shall report to the Auditor of Public Accounts its entire lines operated, owned, leased or controlled, in and out of the State. *If the railroad company owns a majority of the stock of another company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroads should be included in the report required to be made to the Auditor. If required to be reported, the Board of Valuation and Assessment may take them into consideration in fixing the value of the franchise of the controlling company in the State of Kentucky.* That being true, the allegations in the second paragraph of the petition are not sufficient to show that the Board of Valuation and Assessment, in fixing the value of appellee's franchise, adopted a plan different from that provided by the statute." (Page 837.)

In that case the apportionment was on the basis of the *mileage of lines operated, owned, leased or controlled; and the manner of assessment was upheld by the court.*

In the other case, viz., Commonwealth v. U. S. Express Co., 149 Ky. 755, the apportionment, again, had been *on the mileage basis*, and having been made on this basis, the Court of Appeals *upheld the assessment* thus made. It is true that the court did say in that case that the mileage basis is not exclusive, saying "the statute does not confine either the State Board or the courts to the mileage basis but leaves them at liberty to adopt any

other basis, *within statutory limits,* that will aid in reaching a fair valuation." But what was here said was not necessary for the decision of that case, because, as just explained, the Board had adopted the mileage basis of apportionment and the court upheld it; and when the court went on to say that certain facts might possibly in some cases be made to appear, which would authorize a departure from the mileage basis, this was manifestly going beyond the requirements of the case, because no such facts did appear in that case. And, concerning this situation, we can simply call to the court's attention the language of this court in an opinion by Mr. Justice Curtis in Carroll v. The Lessees of Carroll, 16 Howard, 275, in which the court used the following language:

> "If the construction put by the court of the State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then according to the principles of the common law, an opinion on such a question is not a decision. To make it so there must have been an application of the judicial mind to the precise question necessary to be determined, to fix the rights of the parties and decide to whom the property in contestation belongs.
>
> "And, therefore, this court, and other courts, organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties." (Page 286.)

We repeat, therefore, that, so far as we have been able to find, the Court of Appeals of Kentucky has never upheld—in fact has never had before it—an apportion-

ment other than on the "operated, owned, leased or controlled" mileage basis of the franchise of a corporation having lines extending both in and out of Kentucky and coming, therefore, within the provisions of §4081, as the same existed prior to the adoption of the amendment to cover the case of the Southern Pacific, which is a corporation of Kentucky, but has no line either "operated, owned, leased or controlled" in that State.

We, therefore, submit that the Board of Valuation and Assessment departed from the requirement of the statute, from the method or process prescribed by the statute, for apportioning to Kentucky a part of the capital of plaintiff, when it apportioned the tangible property on a mileage basis taking into consideration only the *operated* mileage of the company instead of the "operated, owned, leased or controlled" mileage, and in apportioning intangible property on a gross income basis. And, as said by the Court of Appeals of Kentucky in Hager v. American Surety Co., 121 Ky. 791, in language heretofore quoted, "the Board of Valuation and Assessment has no powers save those conferred by statute," and can only make an apportionment, which is an essential part of an assessment, *in the way provided by the statute.*

Of course, if we are right in the foregoing legal proposition as to the requirement of the statute, it is probably useless to attempt to uphold the policy of the statute or to show why the statute provided the process it did. As a matter of fact, however, this record shows, through the testimony of a very intelligent witness, why

it would be inadvisable and confusing and unfair to attempt to apportion the capital of the company on a basis simply of the operated mileage; and the record further shows that as to the attempt to apportion any part of the property on a gross income basis, there were no reliable data before the Board to enable it to determine what was the gross income of plaintiff from its properties in Kentucky as distinguished from its general properties, and therefore no data upon which an apportionment could be made on the gross income basis, and that it would be practically impossible to prepare such data that would be accurate and reliable.

On the first point, to-wit, the unfairness and impropriety of making an apportionment on the operated mileage basis, the subject is covered by Mr. Lamb in his testimony (Rec., 487, 488), where he states five grounds for this proposition, hardly necessary to detail here.

On the second point, as to the absence of evidence showing reliably the *gross income* of plaintiff from its Kentucky properties as distinguished from its other properties, and as to the impossibility of preparing accurate data on this subject, this is covered by the same witness in his testimony beginning on page 327 of the record under the heading "The Report to the Railroad Commission," and continuing to page 329; the same subject being again covered by the same witness, beginning on page 355 of the record and continuing to page 358, and again still further on cross-examination of the same witness on pages 369 and 370 of the record. The Board having stated in response to an inquiry from the com-

pany that it "considered the statutory report of the company to the Railroad Commission made as of June 30, 1912, in respect to the net and gross earnings of the company within and without Kentucky, and the ratio thereof in Kentucky (Rec., 308) the company showed by the witness above referred to (Mr. Lamb) that the statement of net and gross income in the report to the Railroad Commission here referred to was not of any value in arriving at the values of properties either tangible or intangible.

In the first place this witness showed that this report to the Railroad Commission containing this information about income showed on its face that it was a report made in conformity with the requirements of §825 of the Kentucky Statutes which does not relate at all to the subject of taxation (Rec., 358), that section being not even in the chapter of Kentucky Statutes relating to the subject of Revenue and Taxation, but in a chapter pertaining to the general subject of Corporations. He also showed that the division of the income of a railroad company between States, or even between different divisions of the railroad company, is very largely an arbitrary matter; that certain arbitrary rules have to be adopted for dividing not only the revenues but the expenses of the company, if it is desired to divide these either between divisions of the road or between States; and that while divisions of this kind are made by a railroad company, they are for what the witness called "administrative purposes," by which he means that they afford a basis for *comparison of one year's operations with another.* He explains, which is, of course, true, that, however arbitrary these

divisions may be, yet if they are made on the same basis, for a number of successive years, they afford a means of comparison of the operations for those years; that although the divisions may not be correct and may be arbitrary, yet if the same plan of division is pursued each year, there is a fair basis for a comparison between years. He explained, for example, that out of the total given in the report mentioned as the net earnings of Kentucky for the year ending June 30, 1912, to-wit, $7,068,062.56, he estimated that approximately $6,765,142.23 was *an arbitrary apportionment to Kentucky out of interstate earnings,* the amount of which had been fixed by different arbitrary bases of assignment (Rec., 329).

The witness enters quite fully into the details of the explanation of this matter of how these divisions were made on the pages of the record above referred to, but it seems hardly necessary to go into detail on the subject in this brief. He also explains—which again shows the arbitrary nature of the apportionment of earnings—that all the earnings and expenses *in Ohio* are given *to Kentucky,* although the company has valuable terminals in Ohio and of course a large amount of business originates and terminates in that State. But as a matter of convenience and for the purpose of affording a basis of comparison there is no attempt to apportion to Ohio any earnings and expenses at all, but as just said they are all given to Kentucky (Rec., 329, 356, 369). He also explains the arbitrary manner of apportioning between States the revenue from *express business* and *mail matter* (Rec.. 329 356, 357). In other words, the witness

shows that the report to the Railroad Commission, which contained a statement as to earnings divided between different States, is utterly unreliable as a means for determining the value of the property in any one State; that it was never intended for that purpose; that the divisions of earnings and expenses shown therein were taken from divisions made by the company for mere purposes of comparison of one year with another; that they were to a very large extent necessarily arbitrary in their character, and that it would be very unjust to the company to attempt to fix the values of property thereby for purposes of taxation.

But as said before, while these are explanations by the witness of why it would not be proper to base an apportionment of the company's total capital to Kentucky on either the income basis or operated mileage basis, yet it is really unnecessary to go into that subject, because neither basis is permissible under the statute and it is not necessary to uphold the wisdom of the statute.

VIII.

District Court's Method of Apportionment.

The court determined this question, as to the rule of apportionment, substantially in favor of plaintiff so far as this particular case is concerned, that is to say, it held that the only rule of apportionment was the one named in the statute, to-wit, to apportion to Kentucky that proportion of the capital which the "operated, owned, leased or controlled" mileage in Kentucky bore to the total "operated, owned, leased or controlled" mileage in Kentucky and elsewhere; and that,

while evidence might be introduced in some cases which would call for some adjustment, by reason of peculiar facts, in the application of this statutory rule of apportionment, yet there was no such evidence in this case and therefore that the Board should have apportioned the capital to Kentucky on the basis of the "operated, owned, leased or controlled" mileage.

But, having reached this conclusion, the court then did something else which seems to us quite as unjustifiable, because as unauthorized by the statute, as what was done by the Board. The court held that because the rule of apportionment prescribed by the statute took into consideration the "controlled" mileage, and because the Louisville & Nashville Railroad Company did not own all the interests in the controlled roads, where it owned only a majority of the stock, therefore the value of those interests therein which were owned by *others than the Louisville & Nashville Railroad Company* must be *added to the value of the Louisville & Nashville Railroad Company's total capital,* and that it was this total sum, including the interests of others than the Louisville & Nashville Railroad Company in the controlled roads, that must be considered as the total capital of the Louisville & Nashville Railroad Company, of which there should be assigned to Kentucky the mileage proportion.

There is absolutely nothing in the statute which justifies such a procedure, and manifestly if the statute had attempted to authorize it, the attempt would have been of no effect. The effect of this, of course, is to tax against the Louisville & Nashville Railroad Company *property*

which does not belong to the Louisville & Nashville Railroad Company, and this the State of Kentucky has no power to do. And the fact that the court may think that the rule of apportionment prescribed by the statute may be more advantageous to the railroad company than it ought to be does not justify an attempt to correct the statutory rule by adding to the property of the Louisville & Nashville Railroad Company that which does not belong to it, but belongs to other persons, and taxing a mileage proportion of this against the Louisville & Nashville Railroad Company.

If the court were dissatisfied with the statutory rule of apportionment, on account of its nature as above explained, then we submit that the more logical and consistent correction of the rule, if the court should feel justified in changing the statutory rule, would be to arrive at the operated, owned, leased or controlled mileage by treating as the "controlled" mileage, not the total thereof, but that proportion of the "controlled" mileage which the interests of the Louisville & Nashville Railroad Company therein bore to the total thereof. In other words, to take an arbitrary example, if the Louisville & Nashville Railroad Company owned 75% of the stock of a railroad one hundred miles long, then instead of taking one hundred miles as the mileage of that road, take 75% thereof, or seventy-five miles, as the mileage of that controlled road, in making up the total mileage of roads operated, owned, leased or controlled. And Mr. Lamb made a calculation, which is shown in the record, as to what would be the effect of determining the mileage in that way, and showed

that Kentucky's proportion of the mileage, arrived at in this way, would be 28.32% (Lamb's testimony, Rec., 326, 327 and Exhibit Lamb No. 16, Rec., 414).

But we submit that the court has no right or power to change the rule of apportionment prescribed by the statute. Of course it is difficult to arrive at a rule of apportionment in a case of this kind that will do exact justice, but the Legislature evidently thought that, in view of the results which come from the control of one railroad or other corporation of similar character by another through the ownership of the majority of its stock, including not only the direct benefit which comes from dividends on the stock, but the indirect benefit which comes from exchange of business and increased profits on the lines of the controlling corporation, connecting with those of the controlled corporation, it was proper to consider the mileage of the latter as a part of the mileage of the controlling corporation in apportioning to Kentucky its share of the total capital of the latter. And so as to leased lines. Of course the lessee does not own the entire interest in the line that is leased. The term of its lease may possibly expire in twenty-five or fifty years, and therefore the interest of the lessee corporation may be far less than the total value of the leased road, yet the statute makes no provision for attempting to determine the proportion which the value of the lease bears to the fee simple, in arriving at the mileage of the lessee corporation. Furthermore, the statute also includes lines owned by the corporation to be assessed that are leased to and operated by others for rental. And we submit,

therefore, that the only proper thing, and the only lawful thing, to do in apportioning to Kentucky a part of the capital of a corporation, such as the appellant, doing business both in Kentucky and out of Kentucky, is to *follow the rule of apportionment prescribed by the statute.*

Again, in the case at bar there was no evidence when the court below delivered its opinion herein, August 31, 1915 (Rec., 108), showing the value of the interests owned by others than the Louisville & Nashville Railroad Company in the controlled roads. And the court recognized this and adopted what seemed to us a most peculiar course in view of that fact. The court said:

> "We have seen that, assuming $262,252,566.00 to be the true cash value of plaintiff's unit, as the Board found it to be, 24.9601 to be the true percentage of the fair cash value of plaintiff's unit to be apportioned to Kentucky, and the portion of Kentucky's unit therein not to be of greater value than the mileage proportion of the value of the unit, the latter two of which assumptions I have held to be correct, the fair cash value of the portion of plaintiff's unit in Kentucky was $64,750,418.79. 60% thereof is $38,850,251.12. Deducting therefrom $29,500,772.00, the assessed value of the tangible property, leaves $11,349,479.27 as the value of the franchise, which is about the amount of the assessment for 1911, and less than half the amount on which payment has been made. But, if $262,252,566.00 was the fair cash value of what the Board took to be plaintiff's unit, the fair cash value of its unit was more than this sum. Plaintiff's unit consisted of more than what the Board took it to be. It consisted, in addition thereto, of so much of the controlled mileage as was not represented by the stock and bonds owned by plaintiff. Adding the value thereof to the

sum of $262,252,566.00, and then taking 24.9601% of the total, deducting therefrom the value of the controlled mileage in Kentucky, taking 60% of the remainder and deducting the assessed value of the tangible property, would, as I view it, give the value of the franchise according to the statute. I am unable to make out its value in this way, because there is nothing in the record to show the value of the portion of plaintiff's unit not considered by the Board, or the value of that portion of its controlled mileage which was in Kentucky. It is *possible* that the result of a consideration of these two matters, in the way indicated, would make the value of the portion of plaintiff's unit in Kentucky as much as $92,181,766.00, the sum at which the Board fixed it, by apportioning to Kentucky a part of the value of $262,252,566.00 on the operated-on-its-own-account mileage basis. *I doubt, however, whether it would.*" (Page 150.)

And accordingly, the court simply assumed that the $92,181,766.00 which the Board, *acting according to an improper method,* had stated to be the value of Kentucky's part of the total capital would be the true amount, if the Board had proceeded by a correct method, although there was absolutely no evidence upon which the court could base this conclusion, and the court itself said "I doubt, however, whether it would." Accordingly on this kind of an assumption the court reached the following conclusion on the subject of value:

"Taking 60% of $92,181,766.00 would give $55,309,059.60 as the value of the portion of plaintiff's unit in Kentucky. Deducting $29,500,566.00, the assessed value of the tangible property, leaves $25,808,493.60 as the value of the franchise. And deducting from this balance $22,899,300.00, *the amount on*

which payment has been made, leaves $2,909,192.60 on which payment should now be made.

"A decree will be entered enjoining defendants from enforcing the assessment complained of, and from making and enforcing any other assessment of plaintiff's franchise for the year 1913, on condition that it pays the taxes, State and local, on $2,909,193.60 in addition to what it has paid. But, if either side desires it, the decree may be limited to an injunction against the enforcement of the assessment complained of, without prejudice to the making and enforcing of another assessment for that year, to be equalized at 60%, and to be credited with the sum on which payment has been made." (Rec., 151.)

After the delivery of this opinion plaintiff tendered a supplemental bill (Rec., 236), which was allowed by the court to be filed March 13, 1916 (Rec., 248), and which showed what the facts were as to the value of *other interests* than those of the Louisville & Nashville Railroad Company in the "controlled" roads, and which showed that by adopting the very process pointed out by the court in its opinion, to-wit, adding on to plaintiff's total capital the value of interests owned by others in the controlled roads, and then making the apportionment to Kentucky on the basis of mileage operated, owned, leased or controlled, and then taking 60% of this sum for the purpose of equalizing this property with other property in the State, and deducting therefrom the assessed value of the tangible property, the result would be *less than the amount on which the company had already paid taxes* (which was $22,899,200.00), whether the calculations be made on the stock and bond plan or on the capitalization of income plan (Rec., 238-243).

And to this supplemental bill, though the court allowed it to be filed and it was filed, defendants never filed any answer, so that its allegations must be taken as true and confessed.

In this condition of the record plaintiff tendered a final decree adjudging the assessment which the Board had made of plaintiff's franchise at $45,658,630.00 to be null and void, and enjoining the enforcement thereof, and then stating plaintiff's unwillingness to pay taxes on the additional amount of $2,909,193.60, or any amount over and above what it had paid, and therefore providing that the decree should be without prejudice to the making of another assessment of plaintiff's franchise by the Board for the year in question, provided such reassessment, if made, be made within three months and be equalized with the assessment of other property at not exceeding 60% of its fair cash value, and that the apportionment to Kentucky be made on the basis of the operated, owned, leased or controlled mileage (Rec., 250).

But to this form of decree the defendants objected and thereupon the court entered a final decree from which this appeal is prosecuted, adjudging the assessment already made to be null and void, and enjoining the enforcement thereof, and ordering plaintiff to pay taxes on a valuation of $2,909,292.60 in addition to what it had already paid, that is to say, in addition to taxes based on an assessment of $22,899,200.00, so that the entire assessment on which it should pay taxes should be $25,808,493.60, and enjoining defendants from making or apportioning any assessment in excess of the last-named sum for the year in question (Rec., 252).

So much of the decree as enjoined the making of any assessment greater than a fixed amount was under the authority of Raymond v. Chicago Traction Co., 207 U. S., *supra,* where just this thing was done. But plaintiff protested against the decree in so far as it fixed the sum of the final assessment in excess of that upon which plaintiff had already paid ($22,899,200.00) as it believed this sum to be in excess of any figure which could be arrived at by any legal process. And the action of the court in requiring plaintiff to pay upon an additional amount, and in fixing the final amount of the assessment at any sum in excess of what plaintiff had already paid on ($22,-899,200.00) or in fixing the said amount at any sum in excess of $18,398,438.43, the highest amount which could possibly be arrived at on the court's own suggested process of adding on the value of interests held by others than plaintiff in the controlled mileage, as shown by the supplemental bill (Rec., 238-243) or, in fact, in fixing the amount of the assessment at any sum in excess of $11,-349,479.27, being the value which the court's opinion showed was really the proper amount of the assessment (Rec., 150) was assigned as error on account of which this appeal was prosecuted. And we submit that the proper assessment should not have been in excess of the last-mentioned figure, because that is the figure that would be arrived at by adopting the statutory rule of apportionment to Kentucky and equalizing the assessment with the assessments of other property in Kentucky, even conceding, for the sake of argument, that the Board adopted a correct process for eliminating the non-taxable

assets from plaintiff's total capital, and conceding further that it was not necessary to deduct the total tangible property from the total capital before making the apportionment to Kentucky, neither of which propositions do we, in fact, concede to be true, but either of which, if true, would make the total assessment less than $11,349,479.27.

IX.

Equal Taxation.

Plaintiff, a railroad company, insists on the principle of equal taxation, that is to say, that all *ad valorem* taxation in Kentucky must, under the Constitution of that State, be equal and uniform, and that plaintiff can not be lawfully required to bear a greater burden in proportion to the value of its property than other persons within the jurisdiction of Kentucky are required to bear, and that if the assessment complained of in this case be upheld, that principle will be violated. It claims that other property in the State of Kentucky is uniformly and intentionally assessed for taxation at not exceeding 60% of its actual value, but that plaintiff's property has been assessed at more than its actual value; and that it has been thereby denied the equal protection of the laws of Kentucky, as fixed by the Constitution of Kentucky, which provides, among other things, that taxes "*shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax*" (§171); and that "*all property, whether owned by natural persons or corporations, shall be taxed in proportion to its*

value, unless exempted by this Constitution; and *all corporate property shall pay the same rate of taxation paid by individual property*" (§174).

In discussing this question we will first proceed to show, as a matter of fact, that other property in the State than railroad property is uniformly and intentionally assessed at not exceeding 60% of its value, while plaintiff's property, being railroad property, is assessed at its full value, and then we will discuss the legal questions arising out of that state of facts.

Facts as to Assessments.

That property generally in the State of Kentucky is uniformly, and with manifest intention so to do, assessed at greatly less than its fair cash value, at not exceeding 60% thereof, we are fortunate in being able to prove, not merely by the testimony of individual persons familiar with the custom and practice in the State or in their communities, but by the written official reports of official tribunals of the State. And before referring to their reports, we call attention to the following statute in Kentucky, bearing upon the value to be given to reports of this kind as evidence. §3760 of the Kentucky Statutes provides as follows:

> "Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement, in writing, either in the form of a certificate, return, or otherwise, shall be called in question except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer." (Ky. Stats., Section 3760.)

The Board of Equalization is a Board created by law and of which the Auditor of Public Accounts (likewise a member of the Board of Valuation and Assessment) is an *ex officio* member. (Ky. Stats., Section 4268.) It is the duty of this Board to hear evidence as to the assessments in the various counties of the State and to equalize the same, not equalizing individual assessments, but equalizing counties. And finally it is required to make a report of its proceedings, and this report is required to be published annually in pamphlet form. (Ky. Stats., Section 4279.) This Board did report as to the assessments of the year 1910, which report was published, and is quoted in the bill of complaint in which we find, among others, the following statements (Rec., 15-16):

> "*The revenue laws provide that all property shall be assessed at its fair cash value. It was not contended that this was done in a single county; therefore, the Board of Equalization was not privileged to reduce any returned assessments.*
>
> "We selected those counties that *most nearly conformed to the requirements of law and endeavored to equalize the others with them.* * * *
>
> "The intangible property which we are not privileged under the law to change—a schedule of which is given the Board to indicate the tendency of the assessment—shows beyond question that *ninety per cent of that character of property escapes taxation,* and in one instance, where the amount is approximately known to be an asset of $6,000,000 it is returned $28,500, being 43-100 of 1%. * * * The increase made by the State Board of Equalization averaged 8%, and, with this addition, *is no measure of the cash value of the property in the State.*"

This report is signed by the Board of Equalization for the year 1910, including Mr. F. P. James, the then

Auditor of Public Accounts. For the year 1911 this same Board also made a report, in which, among other things, it said (Rec., 16-17):

> "In this, as in former years, there was no occasion for reducing any county's returned assessment. Not one of them was assessed *at a measure of its fair cash value.* Forty-seven counties were not changed—not for the reason that the Board considered them properly assessed, but because if they were increased the counties that had a per cent added would have had to have been raised correspondingly higher. * * * The impression seems to be gaining ground throughout the State that we have a 'single tax' system and that personal property is exempted from taxation, and inasmuch as real estate is compelled to bear the burden, *it is the privilege of the owner and the duty of the officials to connive to list all property at a very low figure.*
>
> "In the matter of personal property, *no witness testified that the Assessor claimed to have assessed it fully or that the owner had intended to give it in at its worth—in substance they contend that it is not given in anywhere and excuse themselves on the ground that it is a matter of perjury or poverty, and exercise their right of choice.*
>
> "The result is that if the number of lists that the Assessor arbitrarily increases, is added to the number that the County Board of Supervisors raise, *there remains about ninety-five per cent of the people in the State who fix the sum themselves upon which they are willing to pay taxes; and it is a safe assertion that ninety-nine per cent of that ninety-five per cent are not inclined to pay a great amount.*"

The Board of Equalization for the year 1912, was a new Board, but still having upon it three members who had been on the Boards for 1910 and 1911, to-wit: Edgar

Renshaw, John W. Lewis and J. T. Earle. And this Board for 1912 reported as follows (Rec., 18-19):

> "This body has been in session continuously from February 10th to this date, May 31, 1912, and within that time has heard delegates from nearly every county in the State.
>
> "*Our figures for this year show a decrease in the total assessments on real and personal property.* We made raises *only where a great falling off was shown in assessment as compared with the preceding year,* it being the policy of the Board not to increase arbitrarily the assessment of any county.
>
> "This Board has endeavored at all times to be fair in its deliberations and *has as far as possible tried to satisfy the various representatives who have appeared before it to protest against a raise in assessment;* yet it has not at any time overlooked its duty to the State of Kentucky."

In other words, it having been shown by the report of the two preceding Boards that it was not contended by any one that the property in a single county in the State was taxed at its fair cash value, but that, on the contrary, it appeared that the assessments only represented a small part of the value of the property of the State, this last Board reports that the assessments for 1912 "show a decrease" in the assessments of property, and that it (the Board of 1912) had made no raise in assessments except "where a great falling off was shown in assessments as compared with the preceding year," that is to say, that the assessment of the preceding year having already been shown to be far below the real value of property, this Board of 1912 made no raise where the assessment of 1912 was at the same figures as those in

1911, but only made raises where the assessment of 1912 showed "a great falling off" below the assessment of 1911. The result of this, therefore, is that there was not even an attempt to make the assessment in 1912 exceed the assessment of 1911 (which was far below the real value of the property) but only some attempt to bring the assessment of 1912 up to the assessment of 1911, the Board saying, however, that "it tried to satisfy the various representatives who appeared before it to protest against a raise in assessment."

The report of the Board of Equalization for the year 1913, the particular year involved in this case, says:

> "We, in every county, notified the county judge of our preliminary action; in a number of counties the judge accepted our preliminary work and it became final. We made raises in a majority of the counties, in several of them, not as much as should have been, but on account of the disastrous floods that visited them, we thought best not.
>
> "We made no arbitrary raise, in every instance the facts authorized us.
>
> "We want to compliment the county judges of Kentucky on the delegations sent before this Board. *We found them to be gentlemen.* While at all times remembering our duty to the State, *we have tried to make it pleasant for the gentlemen before us;* with a few exceptions, so very few we may call it unanimous, the county delegations before our Board have gone away satisfied, in a good humor, acknowledging that our final action was just to them and the State of Kentucky." (Rec., 19.)

While the Board here speaks of having made "raises in a majority of the counties," yet it is referring to raises above the preceding year of 1912, in which the assess-

ments, as we have just shown, had been reduced below those of 1911, which had been so severely criticized by the Board of 1911. And when we compare the assessments of 1911 with those of 1913, we find that the raise above 1911 was very small. The total assessment for the year 1911, as equalized by the Board of Equalization, was $846,454,020.00 (Rec., 339). That of 1912 was $840,-479,194.00 (Rec., 339), a decrease of nearly $6,000,000.00; and that of 1913 (as shown by stipulation) was $852,-181,205 (Rec., 97), an increase over 1911 of only $5,727,-205.00, or, in other words, an increase *of less than seven-tenths of one per cent.*

These official reports show the fundamental fact which plaintiff alleges in the case at bar, to-wit, that the great mass of property in Kentucky is assessed very far below its fair cash value. It is true the reports of this particular Board do not show at what proportion of the fair cash value these assessments were made, but they do show from their tone that they were very much less than the fair cash value; the language of one of the reports being "not one of them was assessed at a measure of its fair cash value."

We have, however, in this record, the oral testimony of the chairman of the Boards of 1910 and 1911, which made the severe criticisms above quoted, to-wit, the testimony of Mr. John E. Garner, and he shows what the proportion of assessed value to actual value generally was. Speaking on that subject, he says:

> "During the course of my service on the Board, I formed an opinion as to the values of properties in

Kentucky, and also concerning the matter of the relative proportion of actual values to assessed values and in my judgment—it is merely my opinion—as a result of experience and observation while on that Board, that it was the practice of assessors in assessing lands to assess them at from *40 to 50 per cent of their real value.* I speak with reference to all classes of real estate, whether town lots or lands.

"As to the assessment of tangible personal property, it would be very difficult to arrive at a percentage of them. The trouble there was more a matter of escaping taxation than paying taxes. In the matter of thoroughbred stock, however, I might state a particular instance. In Fayette County, where the entire lot of thoroughbred animals was assessed at $57,000, it is my recollection that it was shown by witnesses *that four such animals in that county had been bought within that year of assessment for more than twice that amount.*

"In performing our duties as an equalizing board, when these assessments came in from the different counties, we would take the one that, in our judgment, was the least badly assessed—none were correctly assessed in our judgment—and then make the best figure we could by bringing others up to that.

"The estimate which I have given to the effect that the proportion of assessed to actual value was from 40 to 50 per cent is the result of four years' experience and observation on the Board of Equalization, but you must understand that the Board endeavored to raise that assessment to, I should say, approximately 60 per cent of its value.

"In the four years during which I was a member of the Board of Equalization it annually made reports to the Governor, signed by the members of the Board. I wrote all those reports and endeavored to state the facts—state the case as it was." (Rec., 521.)

On cross-examination Mr. Garner says:

> "I do not think any assessor confessed to any agreement between the assessors throughout the State to assess property at less than its fair cash value, but from an examination of witnesses and matters of transfer we would have cases where all of the *transferred property* was shown to be assessed at 80%, and if we were to ask the assessor if he had assessed the *rest of the property* at that rate, he would admit that he had not; that he had probably attempted to put it at 45% of its real value—that *that was what he had understood was done in neighboring counties.* Many of them admitted that they did not attempt to assess at more than 40% or 50% of the value of the property and the Board of Supervisors did the same thing, many of them." (Rec., 523.)

(The purpose of assessing transferred property at 80% of the consideration stated was doubtless to create the impression that all property was assessed as high as 80%, which is not true.)

Being cross-examined as to why the Board did not raise the assessment of the property to 100%, Mr. Garner testified that he did not understand that the Board of Equalization had the power to do this, as he understood it to be a Board for the purpose of equalizing assessments, and not a Board vested with power to make assessments conform to the law. On this subject he said:

> "As none of them were too high, we looked over all of them, and selected the one that we thought came nearest to being correctly assessed, and then we endeavored to bring the other counties up to that. That was the construction the members of the Board put on the law." (Rec., 523.)

And then he gave this additional reason as to why it would not have been proper to raise all these assessments to 100%, even if this Board had had power to do so. He said:

> "The State assumes that property will produce about so much money on a given assessment; that it will run somewhere near the same; and that that is sufficient, or ought to be sufficient, for paying the State's expenses. *To have raised the assessments to 100% would have doubled the revenue of the State practically.* I do not think I would have done that, even if I had thought that was the law." (Rec., 524.)

In other words, the general run of the total assessments of the State being pretty well understood, the rate of taxation is fixed in view of the amount of these assessments, in order to raise the amount necessary for public purposes; and if these assessments had been raised to 100% of the actual value of the property assessed, which would practically have doubled them, the result would have been to bring into the State practically *twice the amount of revenue that it needed.* And on cross-examination as to whether or not this money would have "kept," Mr. Garner says: "I doubt very much if the money thus raised would have kept over until the next year." (Rec., 524.)

But the reports of the Board of Equalization are not the only official reports to which we can refer on this subject. For the year 1912, under an Act of the Legislature of Kentucky, a State Tax Commission was ap-

pointed by the Governor, which Commission made the most elaborate and exhaustive examination into the whole subject of taxation in Kentucky that has ever been made. And it filed its report on February 12, 1913, extracts from which report (the whole report being very voluminous) have been embodied in this record by stipulation. This report of the Tax Commission quotes and approves some of the criticisms made by the Board of Equalization of 1911, which we have already quoted. Among other things, this Tax Commission's report says:

> "The State Board of Equalization, in its report for 1911, said: 'The impression seems to be gaining ground throughout the State that we have a "single tax" system and that personal property is exempt from taxation and inasmuch as real estate is compelled to bear the burden, it is the privilege of the owner and the duty of the officials to connive to list all property at a very low figure.'
>
> "These facts and this condition of affairs is not secret in the Commonwealth, and similar conditions exist in all of those States which adhere to the General Property Tax. The owners of intangible property, such as moneys, notes, bonds, stocks, etc., fail to list this character of property, justifying themselves on the ground that if they do give it in at all, it necessarily must be assessed at its full value, while real estate is only assessed at from 20 to 70 per cent of its true value, and consequently if they list their intangible property, it necessarily will bear more than its proportion of the public burden. On the other hand, the owners of real estate and tangible personal property claim that holders of tangible property, such as described above, only list for taxation a small part, if any, of their holdings, and that real estate should not be assessed at its full value,

otherwise that the owners would bear more than their proportion of the public burden. *The assessors (120 counties) recognizing the truth of these respective claims, and knowing that assessed values in other counties are low, attempt to equalize matters by assessing real estate at a very low value, not only for the protection of the individual holders of this class of property, but each assessor, for fear if he does not, his county will be made to furnish an undue proportion of the State revenue as a result of this undervaluation in other counties. These are the conditions with which we are confronted in Kentucky"* (Rec., 20, 21).

This quotation from the report of the Tax Commission is admitted by stipulation to be correct (Rec., 96, Sec. 3 of Stipulation).

In another part of the report of the Tax Commission it goes very elaborately into the details of the relation of real value to assessed value. The Commission, in great detail, shows the ratio of assessed to real value of lands and improvements in each county in the State (Rec., 526-534), and makes this general statement on the subject:

"Thus our tables show that the average ratio of assessed value to true value of farm lands throughout the State is about 52%. This establishes the fact of universal undervaluation, although the law calls for full value. * * * *For another purpose the accuracy of the general State average is important, and on that account no pains have been spared to ascertain the correct figure which we place at 52%."* (Rec., 526.)

Surely a party could hardly be expected to produce more credible evidence on such a subject as that with

which we are now dealing than these reports of official bodies; and they show that the great mass of property in the State, so far as it is assessed at all, is assessed at certainly not exceeding 60% of its fair cash value. And in this connection we may say that of the total property of the State of Kentucky, upon which an *ad valorem* tax is levied, about 80% of it comes within the jurisdiction of the Board of Equalization and is, therefore, covered by the conclusions and statements of that Board, as heretofore quoted (Rec., 494).

The plaintiff, however, did not stop with the foregoing evidence upon the question under consideration. A comparison was made between the assessed values of property in Kentucky for the year 1913, and the values of similar classes of property shown by the United States Census report of 1910. Of course, there was no Census report for 1913, but, as explained by Mr. Lamb, the values of property in Kentucky increased from 1910 to 1913, so that this difference in the years is in favor of defendants rather than of plaintiff (Rec., 492). From this comparison the following facts appeared:

For the year 1913 the value of tracts of land with improvements, as *assessed* after the equalization by the Board of Equalization was $355,285,669.00; but the real value of this same class of property, shown by the Census for 1910, was $635,459,372.00, thus showing that the assessed value for 1913 was only 55.9% of the real value of the same class of property in 1910.

Again, the equalized assessed value of thoroughbred or standard stallions, geldings, mares and colts, stallions

of common stock, geldings, mares and colts of common stock, mules and mule colts, jacks, jennets, thoroughbred or standard bulls, cows and calves, bulls, cows and calves and steers of common stock, and sheep and hogs, as fixed by the Board of Equalization for 1913 was $57,318,478; while the real value of such live stock, as shown by the Census report of 1910, was $117,486,662.00; showing an assessed value for 1913, as compared with the real value for 1910, of only 48.8%.

Again the equalized assessed value for 1913 of agricultural implements, wagons, carriages and vehicles of every kind was $8,921,889.00, whereas the real value for 1910, as shown by the Census report for *farm implements and machinery alone* was $20,851,846.00 (which value, therefore, does not include automobiles and other vehicles not used on farms), thus showing that the assessed value for 1913 of all implements and vehicles of every kind was only 42.8% of the real value in 1910 of farm implements and machinery alone (Rec., 492).

Testimony was also introduced showing that the Board of Valuation and Assessment itself, in the assessing the franchises or intangible property of miscellaneous corporations for the year 1913, assessed them at far below their actual value, based on the value of their stocks and bonds, where this information could be obtained, and on the capitalization of their income, where the value of stock and bonds could not be obtained. Mr. Lamb, who made this examination from the records in the Auditor's office, states the following facts:

The total capital of the Cumberland Pipe Line Co., arrived at by capitalizing its net income at 6% was $1,780,000.00 (its stocks and bonds not being shown). The assessed value was placed at $800,000.00, being 44.94% of its actual value.

The total capital of the Louisville Gas Company, arrived at on the stock and bond plan, was $4,520,000.00. It was assessed at $2,250,000.00, or 49.78%.

The total capital of the Louisville Street Railway Company, arrived at on the stock and bond plan was $19,359,481.00. It was assessed at $11,650,000.00, or 60.17%.

The total capital of the Pullman Company, apportionable to Kentucky (on the mileage basis), arrived at on the stock and bond plan, was $1,576,800.00. It was assessed at $600,000.00, or 38.5%.

The total capital of the Kentucky Traction & Terminal Company, arrived at by capitalizing its net income at 6%, was $2,164,700.00. It was assessed at $1,200,000.00, or 55.43%. (Rec., 373, 374.)

The total capital of the Louisville Home Telephone Company, arrived at by capitalizing its net income at 6%, and apportioning it to Kentucky on a mileage basis, was $2,934,804.00. It was assessed at $875,000.00, or 29.81%. Its capital, arrived at on the stock and bond basis, and then apportioned to Kentucky on the mileage basis, was $2,497,509.00; and, as just said, it was assessed at $875,000.00, which is 35.03%. (Rec., 517.)

The Paducah Traction Company was assessed at $260,000.00. Its total capital, arrived at by capitalizing its

net income, was $484,857.00; and arrived at on the stock and bond plan was $1,007,000.00; thus showing that its assessment was 53.62% of the capital, arrived at on one plan, and 25.82% of the capital, arrived at on the other plan (Rec., 518).

The Paducah Light & Power Co. was assessed at $275,000.00, whereas its total capital, arrived at by capitalizing its net income at 6%, was $775,098.00; and arrived at on the stock and bond plan, was $1,285,000.00; the assessment being 35.48% in the one case, and 21.04% in the other case (Rec., 518).

A number of other illustrations of smaller companies were given by the witness. Of course he did not claim to have examined anything like all the assessments of these miscellaneous corporations; but those he did examine are typical and among the largest in the State.

Now, in addition to all of the foregoing evidence, which is largely documentary in character, drawn mainly from reports of taxing boards and tax commissions and census reports, etc., plaintiff introduced in evidence 189 affidavits (read by stipulation as depositions) of persons scattered all over the State of Kentucky, and drawn from every walk of life, farmers, merchants, bankers, ex-county assessors, ex-members of county boards of supervision, real estate dealers, etc., showing the relation of assessed to real value of property in their respective communities, and showing property to be uniformly and intentionally assessed at not exceeding 60% of its real value, except that in some places it is stated that where property was transferred in a given year,

and the purchase price was shown, it was customary for the assessor to assess such property for the following year at 80% of the consideration shown in the deed, but that subsequently this same property would be dropped back to the old figure of not exceeding 60%. It would have made an immense record to have introduced in full these 189 affidavits; but they are epitomized in the record in tabular form, giving as to each affidavit, the name of the affiant, the county of his residence, his ocupation, and the percentage of assessed to real value stated in his affidavit (Rec., 535-539).

Particular reference may well be made in this connection to the affidavit of Mr. John Buechel, who is the City Assessor of the City of Louisville, to which appellant pays large amounts in taxes on the assessments of its franchise by the State Board of Valuation and Assessment. He states that the franchises of State and National banks, and trust companies, alone in the City of Louisville, arrived at by getting their total capital and deducting from it their total tangible property, aggregate $16,466,110, and that the City Board of Equalization, after finding these values, assessed them at only 60% of their actual values; that he himself endeavored to have the percentage raised to 80%, but the City Board refused to do so (Rec., 542). This was of course merely on account of the recognition by this City Board of Equalization that property generally was assessed at not more than 60% of its real value, and that therefore this moneyed capital ought not to be assessed at any greater ratio. The City Assessor of the City of Louisville is empowered

by statute to assess the shares of stock and franchises, or intangible property, of nearly al kinds of public service corporations, *but not railroad corporations,* for city taxes, which assessments are reviewed by the City Board of Equalization (Kentucky Statutes, §2984-a, Subsections 1-13, and §2992—see appendix, p. 177). Thus banks and trust companies and public service corporations generally pay Louisville city taxes (which are quite high, about $1.80 on each $100.00 of value), on only 60% of the value of their intangible property, under the rule of the City Board of Equalization, while railroad companies pay these same high city taxes on the full value, and much more than the full value, of their intangible property, under the assessments by the State Board of Valuation and Assessment.

Furthermore, the Board of Valuation and Assessment itself admitted, or, rather, the Attorney General in its presence and without protest or dissent from it, stated that it had only assessed the banks and trust companies of the State at 80% of their capital. This is shown in the affidavit of defendant Bosworth, then the Auditor of the State, in which he quotes from a statement before the Board, when the assessment now in controversy was being considered, in which the Attorney General, by way of argument and advice to the Board, after referring to certain affidavits, which he had filed before the Board, concluded with this statement:

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> "In the light of the information furnished you by these affidavits, you should be convinced that the property in the State of Kentucky assessed by the assessors, supervised and equalized by the county Board and by the State Board, is assessed at at least *80%* of its real value, *which was the per cent used by this Board in fixing the valuation upon the capital stock of banks and trust companies.*" (Rec., 566.)

And thus it was admitted that this very Board itself, in dealing with a character of property as to which there was but little difficulty in arriving at its actual value, to-wit, banking capital, had deliberately and intentionally assessed the same at only 80% of its real value. And while this is not as low as the percentage which maintains as to property generally in the State, constituting about four-fifths of all the taxable property therein (the banking capital only constituting about 3%), it shows the principle, undoubtedly recognized in every department of the State, to-wit, that property was not, and should not be, assessed at its real value, but at only a percentage thereof.

And by way of showing the relative importance of the different classes of property, to which reference has heretofore been made, there was introduced into the record a statement from the public records, showing the total taxable value of all property in the State as assessed for 1913, and the percentage which each bore to the whole, which statement is as follows (Rec., 544):

Value of lands and personalty	$852,547,141.00	.7581%
Value of miscellaneous corporations	31,576,400.00	.0280%
Distilled spirits	38,832,984.00	.0343%
Railroads and bridges	168,436,200.00	.1490%
Banks and trust companies	34,500,000.00	.0306%
All taxable property	$1,125,892,725.00	100%

Thus it will be seen that lands and personalty (which come under the jurisdiction of the Board of Equalization, the Board which made the stinging criticism of the assessments which it was called upon to equalize), constitute more than 75% of the total taxable property. And if you exclude from the calculations the railroads and bridges, the character of property to which plaintiff's property belongs, it will be seen that the lands and personalty, coming under the jurisdiction of the Board of Equalization, and which are assessed at about 52% of their real value, amount to *nearly 90% of all the property, other than that of railroads and bridges.* And, furthermore, we have seen from the testimony heretofore quoted, with reference to the assessments of miscellaneous corporations, that their assessments do not exceed 60% of the actual value of their franchises, estimated in the same way in which plaintiff's franchise has been estimated. And, as to banks and trust companies, we have seen that the Board itself acted on the fixed rule of assessing this character of property at only 80%, although it constitutes only 3% of the total taxable property of the State.

We submit that the foregoing testimony completely makes out the plaintiff's case as to the uniform practice

in the State of Kentucky of assessing property, other than the franchises or intangible property of railroad companies, at not more than 60% of its actual value.

Now, against all of the foregoing evidence, let us see what the defendants introduced in opposition. Of course, they could not deny the official reports to which we have referred, and which, of themselves, make out plaintiff's case. All they did was to introduce a lot of affidavits of individuals as to how property was assessed in their counties. A few of these are individual in character, but the great bulk of the affidavits thus produced were the affidavits of ex-assessors, *all drawn in exactly the same form*, there being left in each affidavit simply a blank for the name of the affiant, and for the county of which he spoke, being affidavits of the kind which have been spoken of as "machine-made affidavits." The names of those ex-assessors, and the counties in which they had held office, are given in the Record, at pages 578-580; and each is in the following form, omitting in the form we quote the name of the county and the name of the affiant:

> "State of Kentucky,
> "County of ————————, set:
>
> "The affiant, ————————, says, that he was the duly elected, qualified and acting assessor of ———————— County, Kentucky, during the years 1910, 1911, 1912 and 1913; that in assessing property for taxation in said county for said years, affiant *endeavored* to follow the law and assess all property at its fair cash value estimated at the price it would bring at a fair voluntary sale, and if any

property in said county was assessed at less than such fair cash value, it was *unintentional* on the part of the officers in the county whose duty it was to assess property for taxation.

"The affiant says that he never at any time *entered into any agreement* or understanding with any other officer in the State, whose duty it was to assess property for taxation, or any one else, that property should be assessed at less than its fair cash value, estimated at the price it would bring at a fair voluntary sale, and that he *never heard of any such understanding or agreement;* and further he says that no property was ever *intentionally* assessed by him for less than such fair cash value, and if he so assessed any property, it was on account of mistake or lack of proper evidence as to its value.

_____"

It will be observed that this affidavit nowhere says that he assessed property in his county at its fair cash value. The language of the affidavit nowhere says that the property generally in his county was not assessed at less than its fair cash value. What he says is that "he *endeavored* to follow the law and assess all property at its fair cash value," and, again, that "if" any property was assessed at less than its fair cash value, this was "unintentional"; and he never knew of any *agreement* between the assessors of the State to assess property at less than its fair cash value. Of course, in connection with the last statement, we have not undertaken to show that there was an Assessor's Union in the State. Each one was doubtless taking care of his own political prospects in his own county, without much regard for what others did in other counties, except to see that his constituents did not get the worst of it.

It doubtless had some soothing effect on the conscience of the maker of the affidavit, such as we have quoted, to note that he only said he "endeavored" to follow the law, and to say that if property was assessed at less than its fair cash value, it was "unintentional." But what were the obstacles in the way of success in this field of endeavor are not clearly stated—whether it was over-persuasion, or fear for a political future, we are only left to surmise. One assessor, however, Mr. Geo. E. Allen, of Franklin County, at the bottom of his affidavit, in the form above quoted, wrote the following:

> "Affiant says that he *tried to value all properties fairly and equitably,* and in some instances property was assessed at *less than he thought was its fair cash value,* but he let it stand because it was assessed, in his opinion, *as other property in the same neighborhood.*" (Rec., 580.)

Another remarkable thing about these machine-made affidavits of the ex-assessors, in which each one says that he "endeavored to follow the law and assess all property at its fair cash value," all of which affidavits were taken and filed after this suit was brought, is the fact that the Attorney General, when this matter was pending before the Board of Valuation and Assessment, before any suit was brought, filed affidavits concerning some of the very counties covered by these ex-assessors' affidavits, in which it was stated that the property was assessed at *80%* of its fair cash value. Thus take the then Attorney General's own county of Adair. We find an affidavit of ex-assessor, J. M. Woolford, on the stere-

otyped form, saying that he endeavored to assess the property in Adair County *at its fair cash value.* The Attorney General filed before the Board the affidavit of Mr. A. D. Patterson, the sheriff of Adair County, saying:

> "That the Board of Equalization of said county endeavored to list said property to be assessed and equalized at what they considered its fair cash value, and at *not less than 80% of its real value.*
>
> "This affiant is of the opinion that the property assessed in said county has been assessed and equalized *at not less than 80% of its fair cash value.*" (Rec., 587.)

And the same thing is true as to the affidavits of the ex-assessors of Fayette, Kenton and Jefferson counties. While these ex-assessor affidavits on the stereotyped form are all of the character above quoted, where they say they *endeavored* to assess property at *its fair cash value,* and if it was assessed at less this was unintentional, yet affidavits from those same counties had previously been filed by the Attorney General, saying that the same property was assessed at 80% of its fair cash value; and with respect to two of the counties mentioned, to-wit, Fayette and Jefferson, the previous affidavits, to-wit, the affidavits filed by the Attorney General before the Board, *had been by the assessor himself, who made the subsequent stereotyped affidavit.* And in this connection the affidavit of the assessor of Fayette County is worthy of special note—we refer to the affidavit filed by the Attorney General before the Board. The following is its language:

"Affiant, Thomas Bradley, being first duly sworn, says he is assessor of above-mentioned county; that he is familiar with values of property in said county subject to taxation, and that the same is assessed for purposes of taxation at a value equal to the price the same would bring at a fair voluntary sale.

"The affiant *further says* that in all cases *where the consideration is contained in a deed* for real estate the same is assessed for purposes of taxation at an amount equal *to 80% of said consideration.*" (Rec., 589.)

This gives some idea of the value to be attached to the language of these men, when they say that they endeavored to assess property *at its fair cash value.* Here is a man who swore, on April 25, 1914, that he did that, and who had previously sworn, on November 22, 1913, that he did that, but who, in the same affidavit, went on to say that where the consideration for a sale of property was shown in the deed, such property was assessed at 80% of the consideration.

Things like this just simply show that affidavits of that kind, from these ex-assessors, are unreliable and absolutely worthless. And the court knows that if these affidavits can be interpreted to mean that property was assessed in these counties at its fair cash value, then they are untrue. And the court is not required to be deceived by them, and is not in fact deceived by them. As truly said by this court in Jenks v. Quidnick Co., 135 U. S. 460:

"The court is not bound to shut its eyes to the evident character of a transaction."

In the argument on the motion for preliminary injunction in the case involving the assessment for the year 1912, as shown by the opinion of the court in that case, which is made part of the record in this case, it was admitted both by the then Attorney General of the State (Mr. Garnett) and by the special counsel for the defendant (Mr. Rich), that it was practically a universal custom to assess property at less than its fair cash value, and that the only question in this case was as to *what is the remedy for this.* The oral arguments in that case were reported stenographically, and the court quotes from the arguments of Attorney General Garnett and Mr. Rich. After referring to a case he himself had previously decided, the court (Judge Cochran) says:

> "I confined myself in that case entirely to reasoning from the facts in evidence. I might have been justified in saying then as now that it is a matter of common knowledge to any one living in this State with a reasonable acquaintance with its affairs that such is the case.
>
> "Here no one claims that such is not the case. On the contrary it is expressly admitted to be so. In the course of the oral argument the Attorney General expressed himself in this way:
>
> " 'I recognize the fact that the people throughout the State of Kentucky, except those who have only small tracts of land, *list their property at far less than the value of the property.* There are two classes of people who list their property so that you can determine whether it is listed at its fair cash value and that is the class who own property worth less than $2,000 and the corporations who make a sworn statement from which you can see all the property owned by them. I agree with Your Honor and

the statement the gentlemen have made here that there is throughout the country a disposition, not only on the part of the officers, but on the part of individuals to violate the Constitution and the law of the State by listing property at less than its fair cash value, estimated at what it would bring at a fair voluntary sale. It is alleged in this bill that the officers do that. But they will never be able to prove that any officer or set of officers intends to list property differently or to discriminate. As Your Honor knows from experience, when a man comes to list his farm worth $2,500 or $3,500, *he will list it at $1,200 or $1,500.* He puts it down himself at that figure, and then if the assessor or the Board of Equalization attempts to raise him, *he brings to bear all the political and personal influence he can command to prevent the Board from raising his property to its true value.* He does as an individual exactly what the corporations do when they appear before the State Board. When the State Board finds from their statements filed with the Auditor that they have not fixed the true value of their property, they receive notice to that effect and have a hearing before the Board, and what do they do? They use all their influence, and bring to bear the importunities and persuasions of their friends to keep the Board from placing a higher valuation on their property. For these reasons it is almost impossible for any officers, either county or State, to assess the property of individuals or corporations, as his oath requires, at its true value.'

"And in Mr. Rich's brief he says:

" 'Defendants do not mean to defend or attempt to defend the acts of the assessors in this State who disregard their oaths of office by assessing property at less than its fair cash value in plain defiance of the statutory and constitutional mandates on this subject, but on the contrary regard such conduct on the part of such officers, as highly reprehensible.

The question is what is the remedy for this state of affairs.'" (Rec., 230, 231.)

And so thoroughly was the court impressed with the evidence in the case, including the reports of the Board of Equalization (though we did not then have the report of the Tax Commission), and with the admissions of counsel, that the court concluded its opinion on this branch of the case with these words:

> "No longer do the courts have to contend with the sham and pretense that ordinary property in this State is assessed at its fair cash value or substantially so." (Rec., 233.)

And in this connection it may be said that really no stronger testimony of an individual could be found than the testimony of Judge Cochran himself in his opinion. He is a man born and raised, and who has spent all his life, in the State of Kentucky, having always been a very active man, who has kept fully posted on the activities of his State, and is thoroughly familiar with its history, and with the customs and habits of its people, and with the course of the administration of public affairs.

In fact it seems to us that a court in Kentucky should be allowed to take judicial notice of a fact of universal knowledge in that State, a fact shown by official reports to be practically undisputed. We have not overlooked the fact that this court, in New York v. Barker, 179 U. S. 279, where there was neither allegation nor proof of undervaluation, refused to take judicial notice of that fact, the Court of Appeals of New York having refused to do so; but in this case we have both allegation and a

very large amount of proof, in fact it seems to us conclusive proof, of the uniform, systematic, intentional undervaluation, and that property generally is not assessed at exceeding 60% of its fair cash value; and certainly the knowledge on that subject of the judge who decided this case, and who, as said before, has lived all his life in the State of Kentucky, should be very persuasive with this court. In fact the situation seems to us to come within the principle laid down by this court in Brown v. Piper, 91 U. S. 37, where the court took judicial notice of the state of a certain art in deciding a patent case, saying:

> "Of *private and special facts,* in trials in equity and at law, the court or jury, as the case may be, is bound carefully to exclude the influence of all previous knowledge. But there are many things of which judicial cognizance may be taken. * * * *Facts of universal notoriety need not be proved.* See Taylor's Ev., §4, note 2 * * * *Courts will take notice of whatever is generally known within the limits of their jurisdiction;* and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper." (Page 42.)

In concluding his opinion on final submission in the present case on this question of undervaluation, Judge Cochran said:

> "The fact of uniform undervaluation is so overwhelmingly established and to such a marked degree that it would be a reflection on one's capacity to see things as they are not to hold that the undervaluation was intentional. * * * This leaves nothing to be determined but the percentage of fair cash

value at which such property is uniformly assessed; and as to this I see no escaping the conclusion that it is not assessed at more than 60 per cent thereof." (Rec., 149.)

Did the Board Equalize Plaintiff's Property?

It may possibly be claimed by defendants that the Board assessed plaintiff's property also at less than its cash value. But the sworn statements of the members of the Board that made the assessment, filed in this case, contradict them, if they make such claim. Each of the members of the Board that made the assessment (Bosworth, Crecelius and Rhea) made an affidavit (read as a deposition) in this case, in the following form (the three affidavits differing only in the name and official position of the affiant), viz:

"The affiant, Henry M. Bosworth, Chairman and member of the Board of Valuation and Assessment of the State of Kentucky, says *it is untrue that said Board, for the year of 1913, assessed the property of other corporations required to report to said Board, at less than the fair cash value of said property of other corporations* estimated at the price it would bring at a fair, voluntary sale, and at not more than 60% of the fair cash value of said property estimated at the price it would bring at a fair, voluntary sale, and not more than 60% of the real or true value of such property.

"The affiant says it is untrue that the said Board assessed the value of plaintiff's property at far more than the cash v[illegible]e of said property, estimated at the price it would bring at a fair, voluntary sale, and at largely more than the real value of such property. Affiant states that *said Board, in assessing the prop-*

> *erty of all corporations required to report to said Board, used the same general rule or method in ascertaining the value thereof,* and said Board made and fixed the assessments thereon uniformly and without any discrimination in favor of any one of the said corporations so assessed." (Rec., 576-578.)

This is, of course, equivalent to saying that the Board assessed *all corporations,* including plaintiff, at the *fair cash value of their property;* for it says all corporations were assessed by "the same rule or method in ascertaining the value thereof," and, as to corporations other than plaintiff, the affidavit expressly denies that they were assessed at less than the fair cash value of their property.

Certainly, therefore, in the face of these affidavits by all three members of the assessing Board, it can not be said that they assessed plaintiff's property at what they believed to be *less* than its *fair cash value.*

As to how the Board actually did reach the amount of the assessment of the franchise of plaintiff for the year 1913, it is not possible for any human being to tell. All we can say, with certainty, is that it did not equalize or attempt to equalize it with other property by assessing it at not exceeding 60% of its fair cash value otherwise obtained. The Railroad Company earnestly endeavored to find out from the Board, after it made its preliminary assessment, by what exact process the Board had proceeded in reaching its result; but was never able to get this information. The court had held in the 1912 case that the company was entitled to this information; that the statute contemplated and expressly provided that

after a tentative assessment the company should have a hearing before the Board and a chance to show that the assessment was improper. And this involves the right to know by what process the Board's conclusions had been reached. And, accordingly, as said above, the company made a most earnest effort, when the notice of the first tentative assessment of June 28, 1913, was received, to find out just exactly what the process was by which the Board had reached its result; but it was utterly unable to get this information, except that it did learn, in fact, that the Board had pursued *no method.*

In the company's protest before the Board against the tentative assessment, it addressed a number of questions to the Board in the effort to find out its process (Rec., 283-284). In response to this the Board delivered to the company a writing, the first paragraph of which is as follows:

> "In response to the prayer of your protest filed before us as constituting the State Board of Valuation and Assessment, we beg to state to you that in arriving at the tentative assessment of your property for this year, *we were not governed by any particular rules,* as it was our intention to fix the value of your property approximately, and to go more into details in making the final assessment after hearing all the proof offered by you." (Rec., 275.)

In other words, here was a frank statement that the tentative assessment was really not according to any process at all; and that the Board did not intend that the company should know what process the Board intended to adopt until the Board came to make its final assess-

ment, *after which the Company would have no hearing before it.*

The request for information, however, contained in the company's formal protest was not the only effort the company made to get this information. It tried first to get it informally by request, and by correspondence, as shown by the correspondence introduced into the record, beginning at Rec., 255. Counsel thought for a while they were going to get this information, but the giving of it seems to have been stopped by Mr. Rich, the attorney for the Board. In a letter from Mr. Chas. J. Veling, Chief Clerk of the Corporation Department, to Mr. R. E. Fleming, Special Attorney for the Louisville & Nashville R. R. Co., dated June 30, 1913, he says that he had called the Auditor's attention to the request for this information, and then, the letter says:

> "I called Mr. Bosworth's attention to the contents of your letter to me, and after he read the letter, he instructed me to have Mr. Rich carefully go over the figures that he (Mr. Rich) had made and to then send to you such copy.
>
> "I did as directed, and Mr. Rich expressed a desire *that we should not give any figures.*" (Rec., 256.)

And on July 11, 1913, Mr. Rich himself wrote to Mr. Fleming, in which, among other things, he said:

> "Some time ago, the Auditor handed me your letter, in which you requested that you be given the calculations used by the Board in fixing the tentative assessment of the franchise of your company and directed me to reply thereto, which I have neglected to do. He directed me to say, as a mem-

ber of the Board, *he did not make minute calculations of its franchise value* for the reason he had considered and heard fully presented by your attorneys, the question, within the last year. * * * Inasmuch as the tentative assessment is not final and subject to modification upon hearing, *it seems to me no useful purpose could be served by analyzing the methods used in obtaining same.*" (Rec., 257.)

Thus it will be seen that the manifest purpose and desire of the Board was to keep the matter just as vague as possible, and to give the company, which was entitled under the statute to have a full and fair hearing, just as little information as was possible as to the process which the Board intended to adopt, and which it was necessary for the company to know in order that it might prepare proof according to that process. When, however, the company in its final protest put certain specific questions to the Board, the Board purported to make a response thereto, and to that we will briefly call the court's attention. The Board first made a tentative response; and then, a few days later, made a revised, or what might be called a final response. Both papers are given in the record. One of the things for which the company had asked the Board was a statement "showing the figures and calculations" whereby its results had been reached. In response to this the Board, in its tentative response, *gives five different calculations, each of which reaches a different final result, varying in amount as to the value of the company's franchise in Kentucky from $45,172,182.00 to $58,135,648.00, and no one of which reaches the result shown by the tentative*

assessment. (Rec., 298-300.) But the Board's response concludes with this statement:

> "*None of the foregoing calculations were made by the* Board or any one for it *prior* to making the tentative assessment which was made on June 19, 1913." (Rec., 302.)

The Board, however, notified the company that this response was not final, and was subject to modification, and that the Board had modified it; and thereupon the Board delivered its modified response (Rec., 302). This modified response contained the same calculations, which were contained in the tentative response with No. 6 in addition (Rec., 305-308); but the concluding clause heretofore quoted from the tentative response, saying that none of those calculations had been made by the Board *prior* to the tentative assessment, was omitted. But Attorney General Garnett before the Board said to counsel for plaintiff:

> "As I understand, from what the Board has said to me, these calculations were made and used *as evidence of the fact that the result which they reached was correct.* They did not adopt either of these calculations to obtain the result, but used them merely *as evidence of the fact that the result obtained by the calculation that they did make, or the finding that they made, was correct.*" (Rec., 310.)

This seems to us plainly to say that the Board, in actually making its assessment, did not use any of the methods or calculations it furnished to the company in these responses; but that it had made those calculations set forth in the responses, after making the tentative assessment, simply for the purpose of showing that the

assessment which the Board made was correct. In other words, the Board was not willing to give the citizen, or the taxpayer, any real information as to what process it adopted; but simply undertook to show *by other processes, none of which reached the same conclusion that the Board reached,* that the process which the Board did adopt was a correct process. This seems to us a most extraordinary statement.

The company, however, had exhausted every means known to it for getting that trial to which the statute gives it a plain right, but the officials of the State absolutely refused to give it; and it was simply compelled to wait until, at the conclusion of a mere sham of a trial, it heard its sentence pronounced. And to that final sentence, setting forth, as it pretends to do, the process and conclusion of the Board, we now direct the court's attention, from which it will see that as the company had been unable, after notice of the second tentative assessment, made on October 23, 1913, to determine what process the Board had adopted, it is equally as impossible to tell it from the final action of the Board.

We have heretofore quoted the language of the Board in making this final assessment, as taken from the Bill of Complaint, which is admitted to be correct, and we will not here repeat all the figures, or all the steps in the proceeding, many of which have been heretofore discussed, but we will come down to that portion of the calculation, which deals with the particular subject that we now have under consideration, namely, the subject of the "equalization," as it has been briefly called, of the assessment of

the company's franchise, that is to say, to the question of whether or not the Board reduced it after having obtained its 100% value, to an equality with other assessments of taxable property in the State.

For convenience we here repeat this part of the Board's language:

> "Therefore, the Board of Valuation and Assessment places the excess value in Kentucky over the value found on the mileage basis at $2,318,224.00, and fixes and determines the value of Kentucky's proportion of the entire capital stock of respondent at $94,500,000.00, but to be conservative, and out of an abundance of caution to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this State, the Board has considered *less than 80 per cent* of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent, and it is now ordered that the value of the capital stock of the L. & N. R. R. Company in Kentucky for the year 1913, be fixed at $75,159,402.00, which, in the opinion of the Board, is *less than 80 per cent* of its fair cash value, and from this sum there is deducted the assessed value of the tangible property, to-wit, $29,500,772.00 and the remainder, to-wit, $45,658,630.00, is adjudged to be the value of the franchise of the L. & N. R. Company in Kentucky subject to taxation for the year 1913." (Rec., 575.)

This is an extraordinary statement when we come to analyze it. 80% of $94,500,000.00, which the Board says it determines the value of Kentucky's proportion of the capital stock to be, is the even figure, $75,600,000.00. But the Board says that "out of an abundance of caution to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of re-

spondent in this State, the Board has considered *less than 80%* of that which it believes to be the fair cash value," etc. And, accordingly, the Board fixes the amount at the odd figure, $75,159,402.00, which is 79.5% of the alleged total value. Why did the Board abandon the even figure, $75,600,000.00, and adopt the odd figure $75,159,402.00? Why did it discard 80% and take 79.5%? Does the court believe that this was done in order "to be conservative, and out of an abundance of caution to the end that no injustice be done respondent"? The difference is not very great, considering the immensity of the entire sum; and as the Board is supposed to pursue some kind of rational method, the question forces itself upon any reasoning mind, as to how, by what process, on account of what figures or considerations, did the Board reduce the even figure, $75,600,000.00, to the odd figure, $75,159,402.00? Where did this last figure come from? How was it reached? It is apparently the result of some kind of a calculation. It is not a "round figure." It is evidently not a mere rough approximation. In a figure of millions, the last three figures are 402. Where did that final 2 come from? We think we know. It came from the last figure of the assessed value of the tangible property, $29,500,772.00. And the figure, $75,159,402.00, was reached by taking $45,658,630.00, *which the Board had evidently fixed previously* (*by some process which has never been revealed either to the taxpayer or the court*), and by adding to that final result the assessed value of the tangible property, to-wit, $29,500,772.00, which addition produces the sum of $75,159,402.00. In other words,

$75,159,402.00 *was not first determined upon,* from which the assessed value of the tangible property was deducted in order to produce the value of the franchise; but the final value of the franchise, which should have been the *last step* in a ~~railroad~~ rational process, was *first reached and determined upon by some unknown process,* and then to this figure was added the assessed value of the tangible property; and thereby Kentucky's proportion of the tangible and intangible property, to-wit, $75,159,402.00, which should have been an *intermediate figure* in the process, was arrived at.

Or, to put the matter somewhat differently, the pretended process here published, and given to the taxpayer and presented to the court, is not the true process that was used. Instead of a rational, legal process being adopted, which reached the figure given as its conclusion, *that conclusion was first adopted,* and from it a process was produced *by building upon the result previously determined upon.* And this makes the whole proceeding a mere sham and fraudulent pretense.

In jurisprudence there is a principle, described briefly by the three words "*res ipsa loquitur,*" which is to the effect that physical facts may be such as to contradict the testimony of a witness, because they show that a peculiar condition as described by a witness could not possibly have existed in view of certain admitted physical facts. And we submit that the same principle is applicable to mental processes, as well as to physical facts. The workings of the mind are, to a certain extent, known; and the pretense or claim of a peculiar mental process, under given conditions, may be so improbable, so con-

trary to human experience, that the mind will not believe it. And that we submit is the case here. We can not believe, nor can any one believe that the Board reached the even figure of $75,600,000.00, or 80% of the previously ascertained value of Kentucky's proportion of capital stock, and then reduced this even figure to the odd figure of $75,159,402.00, merely in order "to be conservative and out of an abundance of caution to the end that no injustice be done"; and the conclusion is irresistibly compelled that this odd figure was reached by adding together the previously known assessed value of the tangible property, $29,500,772.00, and previously determined final assessment of the intangible property, to-wit, $45,658,630.00, determined by some process, persistently concealed; and that the pretended process given to the taxpayer and to the court is a sham, adopted merely for the purpose of trying to give to the proceedings of the Board the "form of law," and to defend and seek to uphold, by such a form, and by a presumption in favor of official correctness, that which is not fair and just, and which can not be reached by pursuing the substance of the law.

And we have seen that by affidavits *filed in this case*, long after the above-quoted pretended explanation of their assessment of plaintiff was made by them, those same men have sworn that they assessed the property of *all corporations*, including plaintiff, *at the fair cash value* of their property, which thus absolutely negatives the idea that they assessed plaintiffs' property at less than its fair cash value in order to equalize it with other property in the State.

And in this connection, as to the Board's process, we may again refer to the opinion of the court in passing on the motion for preliminary injunction in the 1912 case, because the final assessment for that year (1912) was almost exactly the same as the final assessment for the year now involved (1913), the final assessment for 1912 being $45,428,074.00. And as to whether or not that figure was believed by the Board to be the actual value of plaintiff's franchise, or whether it was only 80%, or any other fixed ratio thereof, the court in its opinion on motion for preliminary injunction in that case, among other things, said:

> "That it was the intent of the Board to make the final assessment at the fair cash value and that it thought it had done so appears from the statements made in the affidavits of the three members of the Board prepared before the oral argument and then filed. They are exactly alike and in each one a statement is made eight times as to the value at which the franchise had been assessed and always the phraseology used is the same. It is that in the opinion of the members of the Board the amount at which the assessment had been made was 'not more than the fair cash value.' * * * Then it is stated positively that the Board sought 'to ascertain the correct value of plaintiff's franchise' and 'strictly followed the statutes of Kentucky in defining the duty of the Board considering with said statutes the decisions of the Kentucky Court of Appeals.' As those statutes require the assessment to be at the fair cash value and the Kentucky Court of Appeals held in the Louisville Railway Company case that an assessment at such value would not be invalid, notwithstanding that other property was substantially under-assessed, it must be taken that the meaning

> intended to be conveyed by this language was that the assessment in question was made at the fair cash value. * * * They do not claim that the Board did in fact make any attempt at equalization. Their position is that it was not bound to equalize and that the validity of its assessment is not affected by the fact that it did not equalize and the assessment is at fair cash value. I think, therefore, that the true construction to be placed on the affidavit is that it does not undertake to set forth just how the assessment was made but *how it might have been made so as to equalize.*" (Rec., 234-236.)

And exactly the same thing can be said of the assessment for 1913, which, as mentioned before, was practically the same amount as the assessment for 1912. In other words, the Board evidently assessed plaintiff's franchise at what it intended to be its cash value, without any reduction for the purpose of equalizing it with other property.

Of course the court will understand that the position of plaintiff is that the value of its franchise, assignable to Kentucky, is very greatly less than the amount given by the Board in its attempted explanation of how it made, or might have made, its assessment ($94,500,000.00); because that amount can not possibly be reached by any proper process, or lawful method, and therefore of course that, if the company's franchise should be assessed at 60%, or even 80% of its fair cash value, arrived at by a proper process, it would be very greatly less than the amount fixed by the Board. But what we mean now to say is that we do not believe the Board made its assessment of plaintiff's franchise by any process of first reach-

ing what it considered the fair cash value of the franchise, and then reducing it by any percentage whatever in order to equalize it with the assessment of other property in the State. We do not believe that the Board attempted to equalize plaintiff's property with other property at all—certainly not at 60%. And we think this belief, or lack of belief, is based on the record before the court.

XI.

The Constitutional Right to Equal Taxation.

The Fourteenth Amendment of the Constitution of the United States, among other things, provides that:

> "No State shall deny to any person within its jurisdiction the equal protection of the laws."

Equal protection of what laws? Not of the laws of the United States because the States have nothing to do with affording protection of those laws. The United States affords the protection of its own laws. This amendment means that no State shall deny to any person within its jurisdiction the equal protection of the laws *of that State.*

Furthermore, this court has held repeatedly that the prohibition of the Federal Constitution applies equally to every department of a State, or, more properly speaking, it should be said that this prohibition of the Federal Constitution applies to any action of the State, whether operating through its judicial, its legislative or its ministerial officers. It was at one time in-

sisted that it only applied to the action of the State of a legislative character, action evidenced by its constitution or statutes; but this is no longer an open question; the law is now absolutely settled that the prohibition of the Fourteenth Amendment applies *to any action of the State whether taken by its judicial, administrative or executive officers.*

We need not go back to the beginning of the law on this subject. It is sufficient to refer to the case of Raymond v. Chicago Traction Co., 207 U. S. 20, which is a case strikingly similar to the case at bar, because the question there involved was the question here involved, to-wit: the right of the State of Illinois or the city of Chicago to assess for taxation the property of certain corporations at their full value, without any reduction for purposes of equalization, whereas, the property of other corporations was fixed at less than its full value. The Constitution of Illinois provides, as does the Kentucky Constitution, for uniformity of taxation, and the statute construed by the court required unformity of taxation; but the assessing Board assessed the property of these corporations at their full value when it was admitted that the property of other corporations and persons were assessed at less than its full value.

Speaking upon the proposition which we are at present discussing, to-wit: that the inhibition of the Fourteenth Amendment is directed against action of the State, through any of its officers, no matter in what department, the court said:

"The State Board of Equalization is one of the instrumentalities provided by the law for the purpose of raising the public revenue by way of taxation. In regard to the corporations of the class of which the appellee and the other corporations involved here are members, it is the duty of that Board to make an original assessment upon them. From the decision of the Board, in making such assessment, no appeal is provided for and such decision is, therefore, conclusive, except as proceedings for relief may thereafter be taken in the courts. As to the examination of local assessing bodies, the Board is one of review, but its decisions are equally conclusive as in the case of original assessments. Acting under the Constitution and laws of the State, the Board, therefore, *represents the State and its action is the action of the State.* The provisions of the Fourteenth Amendment are not confined to the action of the State, through its legislative or through the executive or judicial authorities. Those provisions relate to and cover all the instrumentalities by which the State acts, *and so it has been held that whoever by virtue of public position under a State government deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the State and for the State and is clothed with the State's powers, his act is that of the State.* Chicago, Burlington & Quincy R. R. v. Chicago, 166 U. S. 226. Following the above case, the Federal courts throughout the country have frequently reviewed the action of taxing bodies, when under the facts such action was in effect the action of the State, and, therefore, reviewable by the Federal courts, by virtue of the provisions of the amendment in question. See Nashville, etc., R. R. Co. v. Taylor, 86 Federal, 168; Louisville Trust Co. v. Stone, 107 Federal, 305. In the last case, which related to enjoining the collection of alleged illegal taxes by reason of discrimination, it was said:

> " 'It may be conceded that if the allegations of the bill are made out, there exist in respect to the property of plaintiff and others similarly situated, a systematic, intentional and illegal undervaluation of other property by taxing officers of the State, which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the Fourteenth Amendment.' " (Page 35.)

(And in this connection, it may not be irrelevant to note that the opinion of the Circuit Court of Appeals in Louisville Trust Co. v. Stone, 107 Federal (*supra*), here referred to, was delivered by Judge Day, who is himself now a member of this court and was such when the opinion in Raymond v. Chicago Traction Co. was delivered.)

It being, therefore, true that the Federal Constitution declares that no State shall deny to any person within its jurisdiction the equal protection of the laws of that State, and it being further true that "those provisions relate to and cover all the instrumentalities by which the State acts," what is the application of these principles to the case at bar? The application is on account of the fact that we have here a question as to whether or not the Board of Valuation and Assessment, representing the State, can lawfully assess for taxation the franchises of corporations at their full value while the great mass of property in the State is systematically assessed by other assessing officers of the State at far less than its

full value. The railroad companies insist that this is a violation of the inhibition contained in the Fourteenth Amendment to the Federal Constitution; whereas, the defendants deny this proposition and insist that they have a perfect right to assess the franchises of these corporations at their full value, even though it be a fact that the great mass of other property in the State is uniformly, systematically and purposely assessed at far less than its full value.

Counsel for defendants rely largely upon the case of Coulter v. Louisville & Nashville Railroad Co., 196 U. S. 599, to which we will hereafter refer, but we desire first to consider the question upon principle before coming to that case and showing what was really therein decided.

If the State is prohibited from denying to any person within its jurisdiction the equal protection of its laws, and if it be true that the Constitution of the State requires *all property,* whether individual or corporate, to pay the same rate of taxation, and if it be true that the Board of Valuation and Assessment, representing the State, is assessing for taxation the franchises of certain corporations at their full value, while the great bulk of other property in the State is uniformly and intentionally assessed for taxation at the same time for much less than its full value, then how can there be any escape from the conclusion that the State is thereby denying to these corporations the equal protection of the State's laws. Upon the great mass of property in the State, regardless of who may be the owner thereof, the State levies and collects taxes for pub-

lic purposes on a basis of 60% or less of the value of that property, while upon the property of a few disfavored corporations it levies taxes at the same time, and for the same year, upon a basis of 100% of the value of their property. We repeat the question, then, how can we escape the conclusion that the State is denying thereby to these corporations the equal protection of the State's laws, in that it is making them bear greater burdens than others are required to bear, for the support of the State?

The answer which has been attempted to this by the defendants is that the State has a right to *classify* property for the purpose of taxation, and to assess one class of property at one rate and another class at another rate, provided only that it assesses each item of property of one class at the same rate with each other item of the same class. This may be true as a principle; and it is true. But it has no application to the facts in the case at bar. The only department of a State that has a right to classify property for purposes of taxation is the legislative or law-making department, and the authority for such action is found either in the Constitution of the State or its statutes; and the Constitution of Kentucky has thrown all property for the purpose of taxation, so far as concerns the *rate of taxation*, into one great class. So far from making a classification under which railroad property or corporate property is put into a class by itself and other property in another class, this is *expressly prohibited*, and all property of all persons, natural or artificial, whatever its character and whatever its use, is required to be taxed *at the same rate*.

Section 171 of the Constitution declares that:

"The General Assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be *uniform upon all property* subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws."

And, again, Section 174 of the Constitution says:

"*All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value,* unless exempted by this Constitution; *and all corporate property shall pay the same rate of taxation paid by individual property.* Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises."

The word "franchises," in the last section, is used in its technical sense and in contra-distinction to property.

There could be nothing plainer or more emphatic than these constitutional provisions. So far as the *rate of taxation* is concerned, the State of Kentucky, by its fundamental law, has declared that there shall not be different classes of property, but that all shall be in one class; and, for fear that possibly a distinction might be attempted between corporations and natural persons, there is an express prohibition against such distinction, and an affirmative declaration that "all corporate property shall pay the same *rate of taxation* paid by individual property."

It is true that Section 181 of the Constitution provides:

> "Nothing in this Constitution shall be construed to prevent the General Assembly from providing by law how railroads and railroad properties shall be *assessed* and how taxes thereon shall be *collected*, * * * and until otherwise provided the present laws on said subject shall remain in force."

This, however, only relates to the *manner* of making the *assessment* or the *collection*. It does not refer to the *rate of taxation*, and, of course, was not meant to nullify the express requirement that "all corporate property shall pay the same *rate of taxation* paid by individual property."

Therefore, the law of Kentucky is that, so far as the rate of taxation is concerned, there shall be no classes of property, but that all property shall be in one class and pay the same rate of taxation. That being the law, then does Kentucky give to these railroad companies the equal protection of that law, when one set of officers is assessing for taxation the great mass of property in the State at certainly not exceeding 60% of its value, while at the same time, for the same year, the Board of Valuation and Assessment is assessing for taxation the franchises of these railroad companies at 100% of their value? It seems to us that the answer to this must inevitably be that the State is not giving the equal protection of the laws to these railroad companies, or, to put it in the very language of the Constitution, that it is *denying to these persons the equal protection of this law of the State of Kentucky.*

And, furthermore, we call to the court's attention the fact that not only has the Board of Valuation and

Assessment, a ministerial tribunal of the State, done this, but that it has done it with the approval of the Court of Appeals of the State; because in the case of the Louisville Railway Company v. Commonwealth, 105 Ky. 710, the Court of Appeals expressly refused to give relief where it was shown that the Board of Valuation and Assessment had assessed the franchise of the Louisville Railway Company for taxation at a much higher rate than the assessing officers generally of the State uniformly assessed other property; the court saying that the method of relief open to the oppressed individual or minority was to elect better officers (page 719), as if an individual or minority could control the majority of the people of the State, and require them to elect officers who would take away the advantage of the majority and equalize them with the minority. In other words, while the law of the State, as contained in its Constitution, says that all property shall be taxed at the same rate and expressly says that corporate property shall pay the same rate of taxation paid by individual property, yet both the ministerial and judicial tribunals of the State *have denied to these railroad corporations the equal protection of that law.* And thus the railroad companies have been compelled to go into the Federal courts to obtain the relief to which they are entitled under the Federal Constitution.

As against this reasoning on the subject of plaintiff's constitutional right to have its property "pay the same rate of taxation paid by individual property" and to have the "equal protection" of the State Constitution,

in which reasoning we can perceive no flaw and to which we can conceive of no answer, counsel for defendants refer to the case of Coulter v. Louisville & Nashville Railroad Company, 196 U. S. 590, in which the court (apparently overlooking the provisions above quoted from the State Constitution of Kentucky) says that the State has the power to tax the franchises of corporations at a different rate from the tangible property in the State, citing Bell Gap Railroad v. Pennsylvania, 134 U. S. 232; Merchants, etc., Bank v. Pennsylvania, 167 U. S. 467; Magoun v. Ill. Trust Company, 170 U. S. 283. But we do not deny that general proposition, which is thoroughly well established by the cases there cited; but what we say is that, while the State has the power to thus classify property and to provide that one rate of taxation shall be applied to one class of property, and a different rate to another class of property, yet the State of Kentucky, acting by its Constitutional Convention, has *refused to do that*, and has declared in its fundamental law that all property, whether belonging to the individual or to a corporation, shall be taxed at exactly the same rate. And this being the law of Kentucky, we say that it must afford to all persons within its jurisdiction the *equal protection of that law*, and that with reference to the corporations involved in these cases it has not done this, but, on the contrary, has denied to them the equal protection of that law. The court, however, in Coulter v. Louisville & Nashville Railroad Company was of the opinion that the *evidence* did not show a denial of equal protection; that it did not show that other property in the State was systematically

and intentionally assessed for taxes on a different basis of value from that on which the railroad company's property was assessed; that no scheme to that effect was established in that case. Of course it is not for us now to question whether the court was correct in this conclusion of fact, but it is true that this court's conclusion in that case was that *the case alleged in the bill was not made out by the evidence.*

In the foregoing discussion we have not referred to the authorities, except as we referred to Raymond v. Chicago Traction Co., 207 U. S. 20, to show that the prohibition of the Fourteenth Amendment applies to any action of a State, whether taken by its judicial, administrative or executive officers, and as we referred to the case of Coulter v. Louisville & Nashville R. Co., 196 U. S. 590, for the purpose of explaining it; but the authorities abundantly support the foregoing reasoning and uphold the right of a court to enforce a constitutional provision as to equality and uniformity of taxation by enjoining the collection of taxes against one class of property based on an assessment of 100% of its value, while the great body of other property in the State is uniformly and intentionally assessed at only a portion or percentage of its value, materially lower.

This court upheld this principle in Raymond v. Chicago Traction Co., 207 U. S. 20. In that case it appeared that the Board of Equalization had assessed the franchises of certain traction companies in the city of Chicago at full value, whereas at that time "and for years previous thereto all property, real and personal, cor-

porate or individual, throughout the State as well as in Cook County, had been assessed at not to exceed 65% or 70% of its fair cash value" (page 26), it being also shown that the property of other corporations of like character with the plaintiffs was likewise assessed at very much less than its full cash value. The Constitution of Illinois provided that:

> "The General Assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property."

But it also provided that:

> "The General Assembly shall have power to tax * * * insurance, telegraph and express interests or business, vendors of patents and persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates" (page 21).

It is true the court stated that there was no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the State, which the court said the State might do, and which does seem to have been authorized by the Constitution of Illinois just quoted, and the court proceeds to say: "But it is asserted that the Board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the Board for other corporations of the same class of that year;"

and the court takes up the discussion of the illegality of the assessment on account of this discrimination between corporations of the same class.

It will be remembered, however, that in the case of the Kentucky Constitution there is no authority for imposing higher taxes in proportion to the value of property upon corporations than upon other persons. In other words, all property subject to an *ad valorem* tax, whatever be its nature and whoever its owner, is in one class. So that what this court said in Raymond v. Chicago Traction Company as to discrimination between properties of different persons in the same class applies to the discrimination alleged in the case at bar, *because all property in the State of Kentucky belongs to one class for the purpose of ad valorem taxation,* whether State, county or municipal.

Remembering this, the following language of the court in the Raymond case is striking and important:

> "The most important function of the Board, that of equalizing assessments, in order to carry out the provisions of the Constitution of the State in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property,' was, in this instance omitted and ignored, while the Board was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the Board" (page 37).

Then after referring to the case of Cummings v. Merchants National Bank, 101 U. S. 153, the court said:

> "We have in the case at bar similar facts. A system of valuation was adopted and applied to a large class of corporations, differing wholly from that applied to other corporations of the same class, and resulting in a discrimination against the appellee of the most serious and material nature. It is not a question of mere difference of opinion as to the valuation of property, but it is a question of difference of method in the manner of assessing property of the same kind. Although the law itself may be valid and provide for a proper valuation, yet if, through mistake on the part of the State, through its Board of Equalization, and while acting as a quasi-judicial body, the Board erred in the method to be pursued in relation to the corporations now before us, the mistake is one which may be corrected in equity" (page 38).

And accordingly the court affirmed the judgment of the lower court which had enjoined the collection of taxes based on an assessment against the particular plaintiffs involved in that case, which was higher in proportion to the actual value of the property than in the case of assessments made upon other corporations of a similar kind, and higher also than the assessments made upon property generally in the State, although it was not claimed, as we gather from the report of the case, that the assessments complained of were higher than the actual values of the properties involved. Certainly if they were, the relief sought and granted was not upon that ground, but upon the ground of unlawful discrimination.

The preceding case, referred to in the Raymond case, Cummings v. Merchants National Bank, 101 U. S. 153, decided exactly the principle for which we now contend.

In that case the assessors of real property, the assessors of personal property and the County Auditor (who was the assessing officer in the first instance for bank shares) of the county where the complainant bank was situated, agreed to assess real and personal property at *one-third* its value and money or invested capital at *six-tenths* its value. This agreement was in violation of the statutes under which they were acting. The State Board of Equalization for banks increased the assessment of the complainant's bank shares to their *full market value.* That Board had no power to equalize bank shares with real or personal property and in assessing these bank shares at their full value, it was simply following the exact course prescribed by statute, and the statute was in accordance with the Constitution of Ohio, which required the Legislature to pass laws taxing all property "by uniform rule at its true value in money." The action was brought by the complainant bank to enjoin the county treasurer from collecting the tax on the assessment against its shares which had been certified down by the State Board of Assessors. The Circuit Court of the United States enjoined the treasurer from collecting a tax based on this assessment. The effect of this, of course, was to annul an assessment of the State Board of Equalization, which was strictly in accordance with the letter of the statute governing it in the discharge of its duties, and which was equally in accord with the standard of value for assessment fixed by the Constitution of the State. That decree of the Circuit Court was affirmed by this court in an opinion wherein after re-

ferring to a certain provision of the statute of Ohio, the court says:

> "Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to *operate unequally* and to violate a fundamental principle of the Constitution, and when this rule is applied not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power" (page 157).

The court was asked to hold that the *statute* of the State was unconstitutional as producing necessary inequality, but the court held that this was not the necessary result of the statute. The court, however, did hold that while the statute was constitutional, yet it might be "unfaithfully administered by those who are charged with its execution" and that that was what did appear in the case before the court. The court then states the facts substantially as we have stated them above, and after commenting on the wide extent of the custom of assessing property at less than its real value and of the explanation of this, then concludes its opinion as follows:

> "But, whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property around which the Constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void and the injustice produced under it must be remedied, so far as the judicial power can give remedy. The complainant having paid to defendant, or into the Circuit Court for his use, the

> tax which was its true share of the public burden, the decree of the Circuit Court enjoining the collection of the remainder is affirmed'' (page 163).

As previously explained the decree here affirmed was a decree enjoining the collection of a tax based upon an assessment of bank shares at their real value, which was in conformity with the State Constitution, because it appeared that other property in the State was not assessed at its real value, but at much less than its real value. And it was true in that case, as it is true in the case at bar, that the assessments of different kinds of property were by different tribunals, the court pointing out at least four different tribunals that assessed different classes of property, each of which assessments, however, was, of course, in the name of the State.

The most exhaustive consideration of this question, with a review of all the authorities which could then be found bearing upon it, is in the opinion of Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, in the case of Taylor v. Louisville & Nashville Railroad Co., 88 Fed. 350; the court at that time being composed of Judge Taft, Judge Lurton and Judge Severens. The reasoning of the court in that opinion is so strong, and, as it seems to us, unanswerable, that we take the liberty of quoting quite extensively from it. Speaking for the court, Judge Taft said:

> ''The sole and manifest purpose of the Constitution was to secure uniformity and equality of burden upon all the property in the State. As a means of doing so (conceding that defendant's construction is the correct one), it provided that the assessment

should be according to its true value. It emphasized the object of the section by expressly providing that no species of property should be taxed higher than any other species. We have before us a case in which the complaining taxpayer, and other taxpayers owning the same species of property, are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination, but by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. This is a flagrant violation of the clause of the Constitution forbidding discrimination in taxation between different species of property. That clause is self-executing. Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 160, 36 S. W. 1043. How is it to be remedied? It is said on behalf of the defendants that the only method consistent with the Constitution is by raising the assessments of the real and personal property. This is no remedy at all. It has been suggested (but we can not regard the suggestion as a serious one) that the railroad companies of the State should go before the taxing authorities of each county, and, after notifying each taxpayer, attempt to secure an increase in the total tax assessment of the real and personal property of the State from $312,000,000 to $416,000,000. The absolute futility of such a course, the enormous expense, and the length of time necessary in attempting to follow it, need no comment. *The question presented is, then, whether, when the sole object of an article of the Constitution is being flagrantly defeated, to the gross pecuniary injury of a class of litigants, and one of them appeals to a court of equity for relief, it must be withheld because the only mode of granting it will involve an apparent departure from the method marked out by the Constitution and the law for attaining its sole object.* We say 'apparent'

departure from the constitutional method, because that instrument contemplated a system in which all property should be assessed at its real value. It did not intend that a large part should be assessed at 75 per cent, and a smaller part at 100 per cent. The method of assessing one species of property can not be truly said to be constitutional, without having regard to that pursued with other species; for the essence of the constitutional requirement is uniformity, and uniformity can not be affirmed to exist without a due regard to the methods of assessing all species. Therefore, to enjoin the enforcement of the prescribed method of assessment as to one species of property, when there is a departure from it as to all others, if the injunction secures uniformity as to all, is not so great a violation of the method really prescribed as that involved in a continuance of the existing conditions, and the denial of relief to the injured taxpayer. *The court is placed in a dilemma, from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution.* To hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subserve. It is to stick in the bark, and to be blind to the substance of things. It is to sacrifice justice to its incident. The same dilemma has been presented to other courts. They have not always taken the same horn. There is a conflict of authority, but we are glad to say that the adjudications of that court whose decisions we must follow support the views we have above expressed. Before examining the cases in the Supreme Court of the United States, let us refer to the decisions of some of the State courts upon the question'' (pages 364, 365).

Then the court reviews at length the authorities, both State and Federal, quoting quite fully from many of them, including quotations from Randell v. City of Bridgeport, 63 Conn. 321, 28 Atl. 523; Cocheco Co. v. Strafford, 51 N. H. 455; Manchester Mills v. Manchester, 58 N. H. 38; *Ex parte* Ft. Smith & Van Buren Bridge Co., 62 Ark. 461, 36 S. W. 1060; Board of Supervisors of Bureau Co. v. Chicago, B. & Q. R. Co., 44 Ill. 229; Chicago, B. & Q. R. Co. v. Board of Commissioners of Atchison Co., 54 Kan. 781, 39 Pac. 1039.

Then after citing these State Court authorities, the court takes up the opinions of this court citing Cummings v. Bank, 101 U. S. 153; Bank v. Kimball, 103 U. S. 732; Stanley v. Supervisors, 121 U. S. 550; Bank v. Perea, 147 U. S. 87.

The language of the Supreme Court of Illinois on this subject in Chicago & N. W. R'y v. Boone County, 44 Ill. 240, is so strong and so striking, and is such a clear expression of the justice of plaintiff's claim, that we quote it as follows:

> "It can not be that one portion of the taxpayers in a county, owning taxable property, shall be required to pay more taxes in proportion to its value, no matter how that may be ascertained, than another portion in the same county. If the assessors, regardless of the strict injunction of the law, shall place a value upon property far below its real cash value, and such a practice goes on unchallenged, and is recognized by the authorities having special charge of the revenue of the State, that misconduct *must also contain within itself the great and cardinal principle of uniformity.* No warrant is given, if the law is not strictly observed in the case of individuals,

and their property is not assessed at its actual value, that the property of a corporation situate in the same county, shall be assessed at greater proportional value than that of individuals, even though the enhanced assessment is not on the actual cash value of the property of such corporation. *The same rule which is applied to individuals, justice and the Constitution demand shall be applied to corporations.* To demand of appellants that they should schedule their property at its cash value, while individuals may schedule their property at one-third, or less, of such value, would be to demand of the former three times the amount of taxes demanded of the latter.

"As we said in the Bureau County case, *such a proposition is so monstrous as to be indefensible by fair argument. Such discrimination is condemned, not only by the Constitution, but by the indignant, yet no less just, judgment of an honest people.*" (Page 242.)

In Louisville Trust Co. v. Stone, 107 Fed. 305, this question again came before the Circuit Court of Appeals for the Sixth Circuit at a time when that court was composed of Judges Lurton, Day and Severens. And the court again affirmed the same principle it had previously affirmed in Taylor v. Louisville & Nashville R. Co., *supra*, although in the Louisville Trust Company case the court concluded that the evidence did not support the allegations of the bill. As to the principle involved, however, the court, in an opinion by Judge Day, now Mr. Justice Day, said:

"It may be conceded that, if the allegations of the bill are made out, there exists in respect to the property of complainant, and others similarly situated, a systematic, intentional, and illegal undervaluation of other property by the taxing officers of the State,

which necessarily effects an unjust discrimination against the property of which the plaintiff is the owner, and a bill in equity will lie to restrain such illegal discrimination, and that in such cases Federal jurisdiction will arise because of the equal protection of the laws guaranteed by the fourteenth amendment. Taylor v. Railroad Co., 88 Fed. 350; Railway Co. v. Taylor (C. C.), 86 Fed. 168, in which the grounds of Federal jurisdiction are carefully examined and fully stated by Judge Clark, who delivered the opinion" (page 305).

And it is worthy of comment that this statement of the principle in the Louisville Trust Company case and in the Taylor case is quoted with approval by this court in the recent case of Raymond v. Chicago Traction Co., 207 U. S. 20, 36.

Exactly the same principle has been asserted and affirmed by the Circuit Court of Appeals for the Third Circuit in an opinion by Judge Gray in Jersey City v. Central Railroad of N. J., 212 Fed. 76.

CONCLUSION.

We submit, therefore, on both principle and authority, that the plaintiff has been denied the equal protection of the laws of the State of Kentucky by the Board of Valuation and Assessment, acting for the State, in that plaintiff's property has been assessed for taxation at a very much higher rate than that at which other property in the State at the same time was uniformly and intentionally assessed; and the District Court was, therefore, right in holding that assessment void and in enjoining its enforcement.

But we also insist that the court erred to plaintiff's prejudice in determining some of the rules by which a proper assessment should be made as (1) in determining how non-taxable assets should be eliminated, and (2) in determining how tangible assets should be eliminated in order to arrive at the value of intangible assets, and (3) in determining that the value of interests of others than plaintiff in "controlled" roads should be added to plaintiff's capital of which a certain proportion is to be taxed by Kentucky.

We, therefore, ask that the decree be affirmed in so far as it determines that the assessment made of plaintiff's franchise for 1913 was null and void, but that it be reversed in so far as it ordered plaintiff to pay any taxes in addition to what it has already paid.

HENRY L. STONE,
WILLIAM A. COLSTON,
EDWARD S. JOUETT,
HELM BRUCE,
Solicitors.

December 18, 1916.

APPENDIX.

(KENTUCKY STATUTES.)

Statutes Relating to State Board of Valuation and Assessment.

§4077. (1) Franchise—assessment of. Every railway company or corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a Board of Valuation and Assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in Section 1 (4095) of Subdivision 4 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise,

and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the Board of Valuation and Assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said Board, and shall convene the same from time to time, as the business of the board may require. It shall be the duty of the Attorney-General, when requested by the Board of Valuation and Assessment, to attend said Board at its meetings and advise with same in its proceedings.

§4078. (2) Corporations to report to Auditor to determine value of franchise. In order to determine the value of the franchises mentioned in the next preceding section, shall, annually, between the thirtieth day of June and the first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz.: the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earn-

ings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

§4079. (3) Value of franchise—how determined—lines extend beyond State or county. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased or controlled in this State, and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made. In

cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchise to be taxed, the said Board may excuse the officer from answering such questions: *Provided,* That said Board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assesed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

§4080. (4) Foreign corporations — franchise — how determined. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section, the Board shall fix the capital stock in this State by capitalizing the net income derived in this State, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts of this State, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this State, less the

assessed value of the tangible property assessed, or liable to assessment, in this State, shall be the correct value of the corporate franchise of such corporation, company or association for taxation in this State.

§4081. (5) Interstate carrier—franchise—how fixed. If the corporation organized under the laws of this State, or of some other State government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair-car company or a corporation performing any other public service, the lines of which extend beyond the limits of the State, the said Board will fix the value of the capital stock as hereinbefore provided, and that proportion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State; but if any such railroad or other corporation organized under the laws of this State have all of its lines outside of this State the said Board shall fix the value of its entire capital stock as hereinbefore provided, and apportion to this State for taxation therein the proper proportion and not less than one per cent of its said capital stock, and the amount so apportioned shall be the

value of its intangible property, including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this State and in the county, city, town and district where its principal place of business in this State may be located.

§4083. (7) Auditor to notify corporation of values. It shall be the duty of the Auditor, immediately after fixing such values by said Board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such Board and ask a change of the valuation, and may introduce evidence, and the chairman of the Board is hereby authorized to summons and swear witnesses and, after hearing such evidence, the Board may change the valuation as it may deem proper, and the action of the Board shall be final.

§4084. (8) Auditor to certify to county clerk. The Auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax, and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection, and all county, city, municipal, school and other taxes shall be due and payable thirty days after the notice of the amount of such tax is given by the officer whose duty it is to collect the same.

§4091. (15) Taxes when due—penalties—clerks to furnish statement of value of tangible property. All the State taxes assessed against any corporation, company or association, under this article, shall be due and payable thirty days after notice of the same has been given said corporation, company or association by the Auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent per annum. Any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor and, on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin Circuit Court shall have jurisdiction. It shall be the duty of the county clerk to furnish to the Auditor of Public Accounts, on blanks provided by the Auditor, a statement of the assessed value of the tangible property of all corporations, companies or associations paying a franchise or other tax under this act.

Any county clerk failing to comply with the requirements of this act shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten nor more than twenty-five dollars.

Statutes Relating to Assessment of Franchises (But Not Railroad Franchises) by City of Louisville.

§2984-a. I. Assessment of stock in corporations. That the shares of stock of every incorporated bank, trust company, guarantee or security company, and the franchise of every incorporated gas, water, ferry, bridge, street railway, express, electric light, electric power, telegraph, press dispatch, telephone, turnpike, palace car, dining car, sleeping car and chair car company, and every other light company, corporation or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall hereafter be valued or assessed for city taxes in the manner hereinafter described, by the city assessor in the cities of the first class, wherein such franchise is exercised, to the extent and in the proportion the same is therein exercised: *Provided, however,* That no assessment for city taxes shall be made by any assessor or Board of Valuation and Assessment of the franchise of any private business, mercantile or manufacturing corporation, whose property is not devoted to public use, nor upon the shares of stock of any incorporated bank, trust company, guarantee or security company paying an *ad valorem* tax on its real estate and a license tax in lieu of an *ad valorem* tax on its personal estate.

5. Franchise of carriers—how fixed. If the corporation organized under the laws of this State or of some other State or government be a street railway, telegraph, telephone, express, sleeping, dining, palace, or chair-car

company the lines of which extend beyond the limits of the city, the city assessor will fix the value of the capital stock, as hereinafter provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in the city, bears to the total length of the lines owned, leased or controlled in the city and elsewhere, shall be the value of the corporate franchise of such corporation liable for taxation in the city; and such corporate franchise shall be liable to taxation in each city of the first class, through, or into which such lines pass, or are operated, in the same proportion that the length of the line in such city bears to the whole length of lines elsewhere.

§2992. Complaint of excessive assessment—proceedings. The assessment books in the section named shall remain open in the assessor's office from the fifteenth to the thirtieth of November, and any one who thinks that his personal property, lands, or improvements, or those in which he has an interest, though they be not assessed in his name, have been assessed beyond their value, may, before the last named day, file with the assessor his complaint, specifying the parcel and alleged excess, and the complaint shall forthwith be investigated by the Board of Equalization, which shall, according to the justice of the case, approve or reduce the assessment.

It may, after notice to any taxpayer, increase the assessment if satisfied, on investigation, that it is too low, either as to real or personal property. (*Section as amended by Act, March 21, 1906.*)

FILED
JAN 12 1917
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 778.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLANT,

vs.

ROBERT L. GREENE ET AL., APPELLEES.

No. 779.

ROBERT L. GREENE ET AL., APPELLANTS,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
APPELLEE.

REPLY BRIEF FOR LOUISVILLE & NASHVILLE RAILROAD COMPANY.

HENRY L. STONE.
WILLIAM A. COLSTON.
EDWARD S. JOUETT.
HELM BRUCE.

January 10, 1917.

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I.

Counsel for defendants devote twenty-five pages of their brief (pages 75 to 101, inclusive) to the question of the jurisdiction of the Federal court. And then, at the conclusion of the entire brief, under the title, "Conclusion", they say:

> "We have reduced the points in this case to four, which may be briefly summarized as follows:
> "1. Does the Federal court have jurisdiction?
> "2. * * * * *
> "3. * * * * *
> "4. * * * * *
> "The first point is not material, as the case is here on its merits, and besides, it seems from a careful consideration of all the cases that it is most probable that the Federal courts do have jurisdiction of cases of this character" (page 139).

II.

It is urged that there is no jurisdiction *in equity*, because there is an adequate remedy at law, to wit, the right to pay the taxes, so far as *State* taxes are concerned—and then sue to recover same under section 162 of the Kentucky Statutes.

This subject is treated in our original brief (pages 40-44). But in addition to what is there said, we desire to add that the subject of the question of the right to pay taxes and then to recover them under that statute, where the ground of recovery is an *erroneous assessment*, has been conclusively answered in the negative by the Court of Appeals of Kentucky in the recent case of Louisville Gas & Electric Company *vs.* Bosworth, Auditor, 169 Ky., 824 (decided May 3, 1916), in which, speaking of the statutes of which the section quoted is a part, the court said:

"These statutes became a part of the law of this State in the year 1854. They evidence a continued legislative policy from that time until now. Construing these statutes, it has been held that the Auditor is not an assessing officer; and one claiming that his property has been erroneously assessed for taxation and valued too high, or some property included in the assessment which was exempt from taxation, cannot require the Auditor to make an inquiry into the assessment of anyone's property to determine whether or not an erroneous assessment has been made and thereby money has been collected for taxes which were not due, and to correct such an assessment and to draw his warrant on the treasury for an amount found to have been paid from an erroneous assessment; and *a mandamus will not lie to compel him to do so*" (page 829).

III.

In a brief filed in cases numbered 617 and 618, involving the franchise tax upon the Louisville & Interurban Railroad Company and the Louisville Railway Company, counsel for defendants urge that there was an adequate remedy for the injustice of failing to equalize these corporate properties with other properties in the State, in that these corporations might have applied to the Board of Equalization of the State, which has to do with the assessments of tangible property generally in the State, though it has nothing whatever to do with the assessment either of the tangible or of the intangible property of railroad corporations, and that the railroad corporations might have appealed to that board to raise the assessments of all the property in the State over which that board has jurisdiction. And the proposition is further urged that if such an appeal had proved unavailing, the railroad corporations might then have brought an action against the members of the Board of Equalization and gotten a mandamus against the members of the board to compel them to raise the assessments of all other prop-

erty in the State. There are two complete answers to these suggestions.

1. A simple consideration of *dates* will immediately show that no such course was open to plaintiff. Many months before the Board of Valuation and Assessment made its assessment of plaintiff's franchise, or intangible property, herein involved, the Board of Equalization above referred to had met and completed its work upon the assessments of all of the property within its jurisdiction for the year in question (1913), and had made its report to the Governor, as required by law, and had adjourned *sine die,* and very much the greater part of the taxes owing by the taxpayers of the State, based upon the work of the Board of Equalization, had been paid and full receipts for same given.

The franchise assessment involved in this case is the assessment for the year 1913, based upon the condition of the plaintiff for the year ending June 30, 1912, which the law required to be reported by the company, and which was reported by the company, to the auditor on or before October 1, 1912. The first tentative assessment of this property made by the Board of Valuation and Assessment was made on June 28, 1913 (Rec., 254). This tentative assessment, however, was afterwards set aside for lack of proper notice, and a second tentative assessment was made on October 23, 1913 (Rec., 278). After this tentative assessment, of which plaintiff was notified, a hearing was had before the Board, which again took the matter under consideration, and the final assessment was not made until December 29, 1913 (Rec., 566).

Of course plaintiff could have had no occasion to apply for any kind of relief until after this final assessment was made; and when this was made, the Board of Equalization had long since completed its work, reported to the Governor, and adjourned *sine die.* This board was required by statute to meet in the month of February (Ky. Stats., sec. 4271)

for the consideration of assessments for the year 1913; these assessments having been made by the local assessors as of the preceding September 1. The board, therefore, did its work along in the spring of 1913; and the report of the board for that year, a report made to the Governor of the State, as required by law, showing the result of their work after it was all done, was made, as the report itself shows, on May 31, 1913 (Rec., 19). Following the action of this Board of Equalization, and the certification of their work to the various counties, taxes immediately became payable, and the great bulk of them were paid prior to December 1, 1913, for on this last mentioned date all persons who had not paid became delinquent and a heavy penalty was added to the face of the tax (Kentucky Statutes, sec. 4148).

In other words, by the time the Board of Valuation and Assessment made the final assessment of plaintiff's franchise, or intangible property, for the year 1913, viz. on Dec. 29, 1913, the Board of Equalization had long since completed its work for that year, and adjourned, and the great bulk of the taxes upon the property upon which it had acted had been paid. Therefore, of course, it is manifest that plaintiff had no remedy by a proceeding either before or against that board.

2. Furthermore, aside from the matters just considered, the plaintiff, a corporation whose tangible property is assessed by the Railroad Commission, and whose intangible property is assessed by the Board of Valuation and Assessment, and with reference to whose property the Board of Equalization has no authority whatever, would have had no standing to make any complaint before that board. The procedure of that board is statutory, and no provision whatever is made for its hearing complaints from a party, with the assessment of whose property it has nothing to do, concerning the action of the Board upon such property as does come within its jurisdiction. The Kentucky statute with which we are dealing is wholly different from the Arkansas statute involved in the case of McDougal *vs.* Mudge, 233

Fed., 235, referred to in the brief for appellants, in cases Nos. 617 and 618, involving the Louisville Railway Company and the Louisville & Interurban Railroad Company.

Furthermore, in no event could the plaintiff have obtained a mandamus against the members of the Board of Equalization to compel them to raise the assessments of all property to 100 per cent of their value. The plaintiff could not have shown any interest in the result of such a proceeding, and, therefore, could not have obtained any relief. The tax rates for the State and its various municipalities had already been fixed. Therefore, even if the court should require the Board of Equalization to raise the assessments upon all other property in the State, this would not have given the slightest relief, or been of the slightest benefit, to plaintiff, or affected it to any extent. It would simply have required others to pay more taxes, and would have produced largely more revenue than the State needed, for it would practically have doubled the revenue, as explained by Mr. Garner in his testimony as one reason why the Board of Equalization would not have raised the assessments of all property to its fair cash value, even if it had considered that it had the power to do so (Rec., 523, 524). The plaintiff, therefore, could not have shown in such a case that it had any interest in requiring all other property in the State to be raised to 100 per cent of its value, other than that interest which every citizen has in seeing the law obeyed, which would not have been such interest as would show a cause of action on part of plaintiff. If such a mandamus proceeding had been available at all, it would only have been available at the instance of the Commonwealth as plaintiff.

But, as said before, the fact that the Board of Equalization had entirely completed its labors and made its report to the Governor and adjourned, and that the great bulk of the taxes based on the assessments equalized by it had been paid before the Board of Valuation and Assessment acted upon plaintiff's property, is an all-sufficient and conclusive

reason why the plaintiff could not have gotten any relief through the Board of Equalization.

IV.

In our original brief (pages 60-68) we pointed out that while the tax upon franchises of corporations by the law of Kentucky is a tax simply upon the *intangible property* of the corporation, yet the effect of the method adopted for making the assessment of the franchise in this case has been manifestly to include many millions of dollars of value of *tangible* property. We pointed out that the Board itself ascertained the total value of *all the intangible property of the corporation* for the year in question to be $85,214,453; that by apportioning to Kentucky the greatest amount that could be given by any basis of apportionment which had ever been suggested (the gross income basis), which basis would give Kentucky 38 per cent of the whole, there would only be apportioned to Kentucky $32,421,492 (which, as we point out, is upon an incorrect basis and is vastly more than the law prescribes). But, as we there showed, the Board actually assessed the franchise, the intangible property, of plaintiff at $45,658,630, which is an excess of more than $13,000,000 above any result that could possibly be reached by apportioning the total intangible property to Kentucky on any possible basis that has ever been suggested.

In the brief of our opponents, written since our brief was written, they defend the method of arriving at the assessment of the franchise, and, in effect, plainly contend that it is perfectly proper to include the value of tangible property in the assessment of the franchise. They in effect contend that it is the duty of the Board of Valuation and Assessment to value the total property of plaintiff in Kentucky, including both tangible and intangible property, and then to deduct therefrom simply the assessed value of the tangible property and take the balance as the franchise; the result of which is that if the Board of Valuation and Assess-

ment differs from the Railroad Commission (which assesses the tanglible property) in their estimate of the value of the *tangible* property, this difference is included as part of the value of the franchise; which, of course, makes the work of the Railroad Commission practically a nullity, and makes the payment of the tax on the tangible property based on that board's assessment a mere *payment on account.*

In view of this argument, we have thought it well, in addition to the cases cited in our original brief showing that the franchise referred to in the statutes of Kentucky simply means *intangible property* to say that it is rather striking in what a large number of cases, when construing this identical statute, the Court of Appeals of Kentucky and this Court, and the Circuit Court of Appeals for the Sixth Circuit (which, of course, embraces Kentucky) have, not by implication merely, but in express terms, said that the tax upon franchise by the statutes of Kentucky is *not a tax upon tangible property*, but simply a tax upon *intangible property*. In making this review, we will include the cases referred to in the original brief, simply for the purpose of bringing all of them together.

The first case in Kentucky in which this statute ever came under review by the Court of Appeals, and in which it considered the same most elaborately, was the case of *Henderson Bridge Company vs. Commonwealth*, 99 Kentucky, 623, wherein, in making a general review of the entire tax system, the court said:

> "We find that by Section 4020 the Legislature, for purposes of taxation of corporations, divided their property into tangible and intangible, leaving the tangible to be assessed by the officers of the county where the same was situated,* but that as to the

* In the language thus quoted the court says that the *tangible* property is left to be assessed by the officers of the county where the same is situated. This is true as to tangible property in general, though as to the tangible property of railroad companies this is assessed under a separate section of the statute by the Railroad Commission.

> *intangible (which term was used as synonymous with franchise)*, directed that that should be valued and taxed as provided in Section 4077" (page 639).

The case just mentioned came to this court on writ of error (*Henderson Bridge Company vs. Kentucky*, 166 U. S., 150), and this court said:

> "This was an action brought by the Commonwealth of Kentucky against the Henderson Bridge Company to recover the sum of $3,675.91, taxes levied against that company on *an assessment made of its intangible property*, by the Kentucky Board of Valuation and Assessment for the year 1893" (page 152).

And, again, the court said:

> "The tax on the *tangible property* amounted to $2,762.08, and this, as we understand it, was paid by the company. The tax on the *intangible property* was $3,675.91, which the company refused to pay, whereupon this action was brought for its recovery" (page 153).

And then, again, and still more emphatic, the following language:

> "The tax in controversy was nothing more than a tax on the *intangible property* of the company in Kentucky, and was sustained by the Court of Appeals as consistent with the provisions of the Constitution of Kentucky in reference to taxation" (page 154).

Again the same statute was reviewed by this court in *Adams Express Company vs. Kentucky*, 166 U. S., 171, in which the court, after referring to section 174 of the Constitution as to the taxation of corporations, then said:

> "But this does not prevent *intangible property* from being taxed, and the tax mentioned in section

> 4077 is not an additional tax upon the *same property,* but on *intangible* property which has not been taxed as tangible property" (page 181).

In *Coulter vs. Weir,* 127 Federal, 897, in an opinion by Judge Lurton, afterwards Mr. Justice Lurton of this court, speaking for the Circuit Court of Appeals of the Sixth Circuit, the court, in speaking of the franchise tax required by section 4077 of the Kentucky Statutes, said:

> "That the act does not contemplate that this additional tax shall be imposed upon property, either within or without the State, which is otherwise taxable as *tangible* property is plain. The additional tax is, therefore, a tax upon the *intangible* property of the companies within the act" (page 907).

Then, again, in the same case:

> "If *tangible* property having a situs outside of the State be included in the valuation of the company's *intangible* property, the purpose of the law, being to tax *only intangible* property, is defeated. We therefore read the act, as the Supreme Court seems to have read it in Adams Express Company against Kentucky, as *requiring the deduction of tangible property from the gross value of all corporate assets, whether such tangible property be within or without the State*" (page 908).

In *Louisville Tobacco Warehouse Company vs. Commonwealth,* 106 Kentucky, 165, the Court of Appeals, in again reviewing the general nature of this franchise tax, said:

> "From these provisions it is manifest that the so-called franchise tax is in reality a property tax upon all the *intangible* property of the corporations named in the act" (page 167).

And in support of this conclusion the court quoted the language of this court, which we have quoted above, in the Henderson Bridge and Adams Express Company cases, and

also referred to its own former opinion in the Henderson Bridge case above quoted.

In *Marion National Bank vs. Burton, Sheriff*, 121 Kentucky, 876, the Court of Appeals again announced the same principle, quoting its own language which we have just quoted from the Louisville Tobacco Warehouse Company case (page 888), and further said:

> "We are perfectly satisfied from a study of these sections that the legislature has intended to tax all property of these corporations, State banks and trust companies included; that the tax is to be imposed upon the real property, just like all other real property is assessed; that their *intangible* property, which includes their capital and the value accruing to it by its earning capacity, employed as it is under the corporation's charter, shall likewise be taxed. The latter is called, for purpose of classification, a 'franchise tax'; but it is none the less a property tax, imposed *upon the intangible property of the corporation*" (page 889).

And again in the same case the court said:

> "If, as is the requirement of our statutes, and doubtless the practice of the Board of Assessment, in taxing the bank's *intangible* property, which includes its capital *not invested in tangible property*, the tax is called a 'franchise tax,' it is nevertheless in fact an ad valorem property tax upon the capital of the bank" (page 891).

In *Commonwealth vs. Cumberland Telephone and Telegraph Company*, 124 Kentucky, 535, the Court of Appeals said:

> "The franchise tax under the statute is, as has been often held, *simply a tax upon the intangible property of the corporation.*" (Citing the cases heretofore referred to, page 538.)

In Commonwealth against Walsh's trustee, 133 Kentucky, 103, the following language was used, which is particularly significant in the present case:

> "But from the first decision of this Court construing it (Henderson Bridge Company against Commonwealth, 99 Kentucky, 623) to the last, and consistently throughout, it has been held that the tax laid upon the franchise is a property tax purely, and is in fact the taxing of all the *intangible* property of the corporation, including its capital. Throughout the whole scheme of taxation adopted by this State *there is an evident purpose to avoid double taxation, not alone in not taxing the same property twice in the same year for the same purpose, but as well in not taxing the same thing, whatever its form, twice in the same year for the same purpose*" (page 112).

And again in the same case the court said:

> "As we have said, and repeated, a corporate franchise for purposes of taxation is *the sum of its intangible property*" (page 113).

In *Anderson, Revenue Agent, against L. & N. Railroad Company*, 142 Kentucky, 663, the Court of Appeals said:

> "Up to 1892 corporations had paid no tax whatever upon their franchise, but by an act of the legislature in that year railroads were required to pay a franchise tax *in addition* to a tax upon their *tangible property*. The method provided for ascertaining the value of the franchise was, with some minor exceptions, the same as the law now in force upon this subject. Thus we have the *tangible property* of all railroads in Kentucky assessed by the Railroad Commission, and their *intangible property, or franchises*, assessed by the State Board of Valuation and Assessment. The authority for the former is found in section 4098, and for the latter in section 4077, Kentucky Statutes" (page 665).

It is true that the court in this case used the language quoted by counsel for defendants in the case at bar to the effect, that the operation of the two statutes resulted practically in making the Board of Valuation and Assessment the final assessing tribunal; but this remark by the court was not at all called for by what was involved in the case, was a pure dictum, and seems to have been merely thrown in as a passing comment. The case really involved simply the question of whether the revenue agent could bring suit against a railroad company to have property assessed as "omitted property" prior to the action by the Railroad Commission and the Board of Valuation and Assessment for that year. And the court held that all railroad property of every kind, whether tangible or intangible, was required to be assessed by one or the other of those two bodies, and hence that property could not be said to be "omitted" before those two bodies had acted. And, as just said, the statement, in substance, that the action of the Board of Valuation and Assessment to any extent, superseded the action of the Railroad Commission in assessing the tangible property of the corporation, was pure dictum, and was manifestly contrary to the very principle which the court itself had previously announced in the same opinion, and which had been announced in many previous cases, viz., that the "franchise" upon which the statutes levy a tax is simply synonymous with "intangible property," which of course excludes the idea that it can include tangible property.

Again counsel say that in *Commonwealth vs. Covington, &c., Bridge Co.*, 114 Ky., 343, the Court of Appeals upheld an assessment of the company's franchise where the Board apportioned to Kentucky the mileage proportion of the total capital stock, and then deducted from this the assessed value of the tangible property in Kentucky, taking the remainder as the franchise. Under the facts appearing in that case the court seems to have regarded it as not very material whether the board first deducted the entire tangible property

from the total capital, and apportioned the balance, viz., the intangible, or, on the other hand, first apportioned the total and then from Kentucky's portion deducted the assessed value of the Kentucky tangible. But it did not appear under the facts in that case, nor in any other case referred to as incidentally touching this point, as it does appear under the facts of this case that the result of the latter process in this case, is to include in the assessment of the *intangible* property a very large amount of *tangible* property. And, we must presume that, if it had so appeared, then, in view of the court's oft-repeated declaration that the assessment of the "franchise" is simply an assessment of the *intangible property*, the court would not have upheld the assessment.

In *City of Newport vs. South Covington, etc., Railway Company*, 156 Kentucky, 403, the court repeated its own language in the preceding case of Commonwealth against Walsh's Trustee, 133 Kentucky, 103, which we have heretofore quoted, but which for emphasis we repeat, as follows, the italics being the italics of the court, to-wit:

> "Throughout the whole scheme of taxation adopted by this State there is an evident purpose to avoid double taxation, not only in not taxing the same property twice in the same year for the same purpose, but, as well, in not taxing the same thing, *in whatever form*, twice in the same year for the same purpose. Double taxation is oppressive, and, where it is imposed upon some classes of property and not upon others, works an inequality which is fundamentally vicious" (page 407).

If a principle can be settled by judicial decision, the principle has been settled that the "franchise" tax imposed upon certain corporations by the statutes of Kentucky is not a tax upon *tangible* property, but simply a tax upon the total of its *intangible* property. Furthermore, it is manifest that if the construction contended for by our op-

ponents be true, and if the assessment complained of in the present case was correctly made, that assessment does include millions of dollars of *tangible property*. And if this position be correct, then the assessment of the *tangible* property *by the Railroad Commission* is rendered an absolutely useless and purposeless, though troublesome and expensive, thing; because it is swallowed up in the assessment by the Board of Valuation and Assessment, and merely becomes an assessment on the tangible property *on account;* and the tax paid upon the tangible property as assessed by the Railroad Commission is not a complete payment of the company's tax on its tangible property, but is merely a payment on account, even of the tax upon the tangible property. It is inconceivable that the legislature could ever have so intended. What possible reason could be suggested for having two tribunals *assess the same thing for the same year*, and make the payment of the tax based on the assessment by the one a mere payment on account of the tax based on the assessment by the other? There is no pretense that there is a right of appeal from the one to the other: there is no suggestion of such a thing in the statute. The two tribunals are absolutely independent of each other. But if the position taken by our opponents is correct, then it is true that the statute does provide for a tax upon the same thing twice in the same year. The entire tangible property of a railroad company is first assessed by the Railroad Commission, and when the railroad company pays the tax based upon this assessment it is supposed to pay the tax on its entire tangible property. And yet, according to the construction of our opponents, when the Board of Valuation and Assessment assesses the *franchise*, it can again make an assessment based, in part at least, and in the present case to the extent of many millions of dollars, *upon the same tangible property which the Railroad Commission had previously assessed*, and upon which the tax had previously been paid.

And as bearing upon this question, we may call attention to the fact that the Railroad Commission is a body created by the Constitution of Kentucky, section 209 (quoted in full on page 7 of the brief for appellant in cases Nos. 617 and 618, involving the tax upon Louisville & Interurban Railroad Company and the Louisville Railway Company), while the Board of Valuation and Assessment is a purely statutory tribunal, not mentioned in the Constitution. And it is hardly to be believed that the action of this constitutional tribunal is to be absolutely superseded and rendered of no practical effect by the action of the statutory tribunal.

And there is a practical result which flows from the inclusion of the value of *tangible* property in the assessment of "franchise" by the Board of Valuation and Assessment, which manifestly was never intended. When the Railroad Commission assesses the tangible property, it very properly assesses it *by divisions* of the road. And thus the counties through which the very valuable main-stem division runs get the benefit of the taxes on that large value, while the counties through which some small, unimportant branch line runs get only the benefit of the tax on that small value. And this, of course, is as it should be. But when the Board of Valuation and Assessment includes the value of tangible property in its assessment of "franchise," the *same average per mile of the whole* is distributed among all the subdivisions of the State on a mileage basis, without any regard whatever to the real value of the tangible property actually in a particular subdivision, which is plainly contrary to the intent of the statute as to the assessment of *tangible* property. While it does contemplate that the entire "franchise" or *intangible property* apportioned to Kentucky shall be distributed over the whole State on a mileage basis, it does not contemplate that the tangible property as a whole shall be so distributed. And this distinction was expressly recognized and pointed out by the Court of Appeals of Kentucky in Southern Railway *vs.* Coulter, 113 Ky., 657, 675, quoted in our original brief at page 85.

We therefore submit that any process or method for ascertaining the value of the franchise, or intangible property, of a corporation having lines both in and out of Kentucky, *which results in taxing as* INTANGIBLE *property millions of dollars of* TANGIBLE *property,* whether in or out of Kentucky, is not proper; and that when the Board of Valuation and Assessment in the case at bar found, as it did find, (1) the value of all the property of the plaintiff, both tangible and intangible, wherever situated, both within and without Kentucky, and also found, as it did find, (2) the value of *all the tangible property* of the corporation, wherever situated, within or without Kentucky, it should then (3) have deducted the value of all the *tangible* from the total of the whole, thus leaving the total *intangible* property, and then (4) should have apportioned this to Kentucky on the basis provided by the statute.

And this is exactly what was held by the Circuit Court of Appeals of the Sixth Circuit in the case heretofore referred to, of *Coulter vs. Weir,* 127 Federal, *supra.* Any other process will almost inevitably result in including the value of tangible property in the franchise which is intended by the statute to cover simply intangible property.

V.

Among other evidence relied upon by plaintiff to show the undervaluation of property in Kentucky in the assessment thereof is the census report for 1910, showing the values of (1) farm lands and improvements, (2) farm implements, and (3) live stock. Counsel for defendants, in their brief, in endeavoring to show that the census report is not competent as evidence, say:

> "I do not think the United States census is competent evidence to show the value of property for purposes of taxation. *The census enumerator is not required to ascertain the value of property.* The state-

> ment as to value of property found in the census report is nothing more than a statement of the individual" (Brief for Defendants, page 128).

Counsel are entirely mistaken in their conception of the nature of the census report. It is expressly required to show the things mentioned above. Section 4387 of United States Compiled Statutes (1913 edition) contains the following provision, with reference to the thirteenth census (of 1910), to wit:

> "The schedules relating to agriculture *shall include* name, color and country of birth of occupant of each farm, tenure, acreage of farm, acreage of land under irrigation, acreage of woodland and character of timber thereon, *value of farm and improvements, value of farm implements, number and value of livestock* on farms and ranges, number and value of domestic animals not on farms and ranges, and the acreage of crops planted and to be planted during the year of enumeration, and the acreage of crops and the quantity and value of crops and other farm products for the year ending December thirty-first next preceding the enumeration" (U. S. Compiled Statutes, section 4387).

It seems to us not necessary to make elaborate references to authorities to show that the census is competent evidence upon matters required to be shown thereby. We may, howver, refer to the following brief statement from Wigmore on Evidence, to wit:

> "The census is an inquisition of population, manufactures, agriculture, wealth, and many other classes of sociological data, and is made under an express legislative warrant and authority. It is therefore admissible under the general principle already considered" (volume 3, section 1671, sub-section 7).

Furthermore the Court of Appeals of Kentucky held in *Bertram vs. Witherspoon's Adm'r,* 138 Ky., 116, 119 (127

S. W. Rep., 533) that a school census was competent evidence as to the age of a pupil, and was more reliable than the recollection of witnesses.

VI.

Our attention has just been called to language in a brief entitled "Brief for the State Board of Valuation and Assessment of Kentucky" in cases 642, 643, 644, and 645, involving the Illinois Central Railroad, in which, at page 53, it is said that the Court of Appeals of Kentucky has held that under section 182 of the Constitution "the Legislature may provide by law that railroads and railroad property may be assessed *at a different rate* and in a different manner from other property in the State." And the two cases cited in support of this statement are *Commonwealth vs. E. H. Taylor,* 101 Ky., 325 and *Commonwealth vs. Southern Pacific,* 150 Ky., 97.

A simple reading of those cases will immediately show that the statement is wholly erroneous in so far as it says the court held that railroad property might be assessed "at *a different rate.*" And no one denies that it may be assessed "in a different manner."

Some years ago, in conformity with quite a widespread feeling that the system of universal ad valorem taxation was not the wisest system that could be devised, and that some latitude for classification should be allowed, the Legislature of Kentucky proposed, and the people adopted, an *amendment to the constitution,* reading as follows:

> "And the General Assembly may, by general laws only, authorize cities and towns of any class to provide for taxation, for municipal purposes, on personal property, tangible and intangible, *based on income, licenses, or franchises, in lieu of an ad valorem tax thereon.*"

Thereupon the legislature authorized, and the Louisville General Council passed, a tax ordinance of that kind. But because the *result* of the tax under the ordinance was less burdensome, produced less tax, than an *ad valorem* tax upon the same persons and property would have produced, the Court of Appeals held it void, saying:

> "The amendment to the Constitution does not authorize that the substitution of one system of taxation for the other shall in any wise affect the *equality of burden* which that instrument contemplates."
>
> *Schuster vs. City of Louisville*, 124 Ky., 189.

Respectfully,

HENRY L. STONE.
WILLIAM A. COLSTON.
EDWARD S. JOUETT.
HELM BRUCE.

January 10, 1917.

JAN 4 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

(OCTOBER, 1916, TERM.)

No. 778

Louisville and Nashville Railroad Company, Appellant,

vs.

Robert L. Greene, Auditor of Public Accounts of Kentucky, et al., - - - - - Appellees.

and

No. 779

Robert L. Greene, Auditor of Public Accounts of Kentucky, et al., - - - - - Appellants,

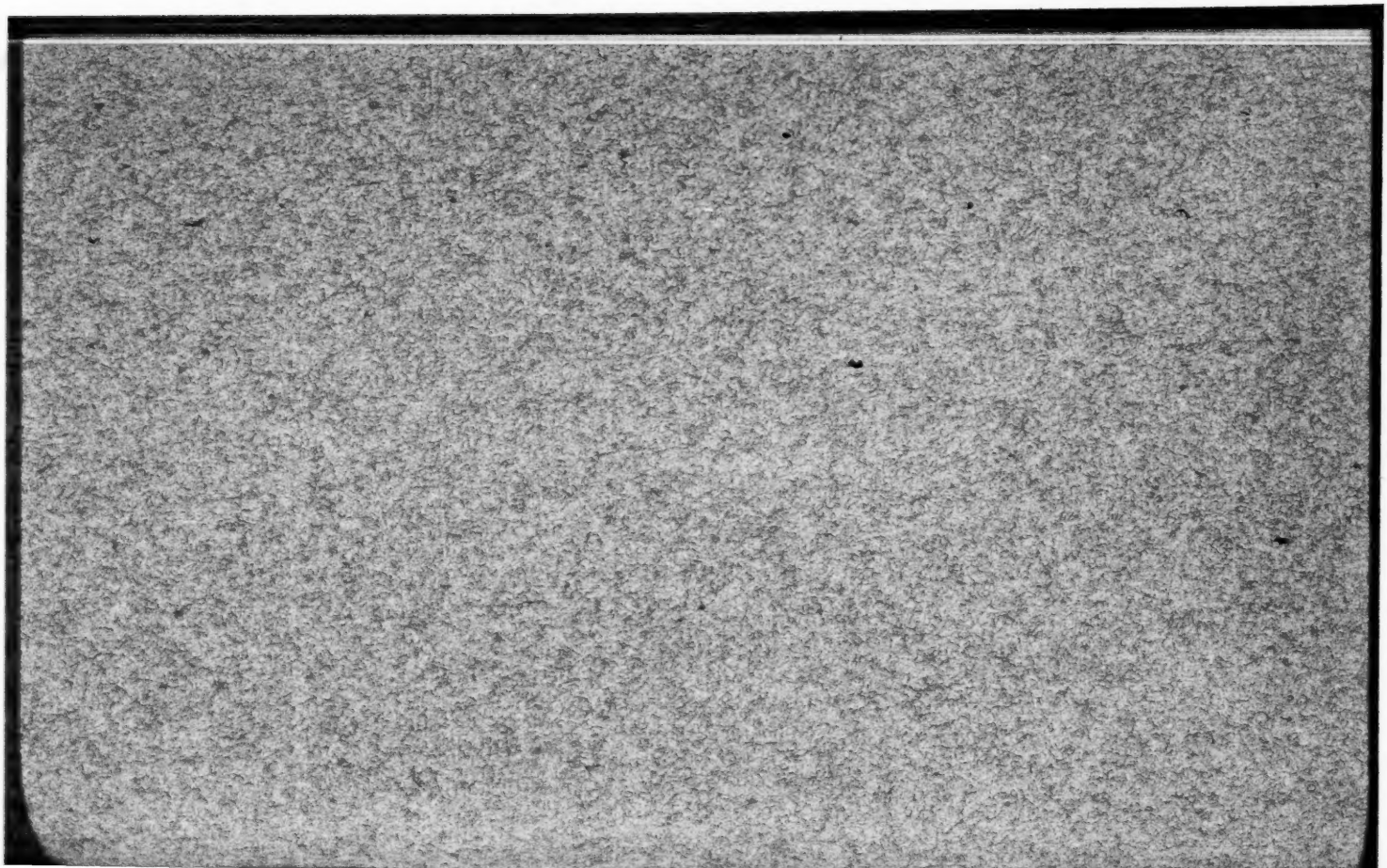
vs.

Louisville and Nashville Railroad Company, Appellee.

BRIEF FOR STATE BOARD AND OFFICERS.

M. M. LOGAN,
Attorney General.
CHARLES H. MORRIS,
Assistant Attorney General.
JOHN L. RICH,
CHARLES CARROLL,
Attorneys for State Board.

THE STATE JOURNAL CO., FRANKFORT, KY.



LOUISVILLE AND NASHVILLE RAILROAD FRANCHISE TAX CASES, NOS. 778 AND 779.

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(2) This action is a suit against the State 8

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Supreme Court of the United States

No. 778

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellant*

vs.

ROBERT L. GREENE, AUDITOR OF PUBLIC ACCOUNTS, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT OF THE STATE OF KENTUCKY, ET AL., - - - - - - *Appellees*

No. 779

ROBERT L. GREENE, AUDITOR OF PUBLIC ACCOUNTS, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE BOARD OF VALUATION AND ASSESSMENT OF THE STATE OF KENTUCKY, ET AL., - - - - - - *Appellants*

vs.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - - - *Appellee*

BRIEF FOR STATE BOARD AND OFFICERS.

STATEMENT OF CASE

May it Please the Court:

In this brief when we use the word "plaintiff" we refer to the plaintiff in the court below and when we use the word "defendants" we refer to the defendants in the court below.

The State Board of Valuation and Assessment in the State of Kentucky is composed of the Auditor of Public Accounts, the State Treasurer and the Secretary of State. It is the duty of this board to make an original assessment of certain classes of property in Kentucky for taxation.

The Statutes of Kentucky prescribing the duties of this board and defining the property which shall be assessed by it, as well as the other statutes touching the questions for determination in this case are set out in full in Appendix A attached to and made a part of this brief, and in referring to said statutes reference will be made to said Appendix.

It is the duty of said board to assess the property of steam railroads and obtain what is termed the franchise value of said railroads, but in reality it is the duty of the board to ascertain the entire value of the property of railroad companies in the State of Kentucky, and from the entire value so ascertained, the statutes require the deduction of the assessed tangible value of such railroads as fixed by the Railroad Commission in the State of Kentucky, and the remainder is termed the franchise value, although, as as will be shown by the decisions of the Court of Appeals of Kentucky, the value so ascertained by the State Board of Valuation and Assessment is not a franchise value but is the value of the property of the railroad over and above the value fixed by the Railroad Commission and the tax is a property tax.

The appellant, the Louisville & Nashville Railroad Company, is a corporation organized and existing under the laws of the State of Kentucky, and owns, operates and controls lines of railroad within and without the State. It does both an intrastate and interstate business.

Under the provisions of Section 4077, Kentucky Statutes, page XI., Appendix A, appellant is required to pay a franchise tax within the meaning of the laws of Kentucky, and by the provisions of Section 4078, Page XII., Appendix A, it is required to make a report annually to the Auditor between the 30th day of June and the 1st day of October, and this report must contain certain specific information which is necessary in order that said board may determine the entire value of the property owned by appellant in the State of Kentucky. The board may require additional information from the railroad company and may obtain information from other sources.

The method that the board must pursue in ascertaining the value of a railroad company in the State of Kentucky which has lines within the State and without the State, is set out in Section 4079, page XIII., Appendix A. The plan is simple in that the board is required to ascertain the entire value of the property of the railroad company as a unit. After having ascertained the entire value of the capital stock of the railroad system the board must apportion to Kentucky its proportional part of the capital stock so found, and in making the apportionment the board must consider the total number of miles owned, operated, leased and controlled by the company and the total number of miles owned, leased, operated and controlled by the company within the State. The percentage that the mileage in the State bears to the total mileage is what is termed the mileage basis of apportionment. When the proper proportion of the entire value of the capital stock is apportioned to Kentucky, the statute requires that the value of the tangible property as assessed by the Railroad Commission shall be deducted from that part apportioned to Kentucky, and the remainder is the franchise value.

It will thus be seen that the State Board of Valuation and Assessment has only two questions to determine. The first is the total value of the property of a railroad, and the second is the proportion of that value which shall be assigned to Kentucky. The other steps are automatic. The assessment involved in this suit is that made by the State Board of Valuation and Assessment for the year 1913 based upon the report of plaintiff as of June 30, 1912. Under the provisions of Section 4096, page XI., Appendix A, plaintiff on or before the first day of August, 1913, made a report to the Auditor containing information required by the provisions of that section for the year ending June 30, 1912. This report, under the provisions of the law, was turned over to the Railroad Commission and the Railroad Commission made the assessment of the tangible property of plaintiff in the State of Kentucky. The value of the tangible property for said year was assessed by the Railroad Commission at $29,500,772. Under the provisions of Section 4078, page XII., Appendix A, plaintiff made a report to the Auditor for the year ending June 30, 1912, which report was turned over to the State Board of Valuation and Assessment, and after a consideration of this report, together with such other information as the board could obtain, and after a lengthy hearing, at which hearing much evidence was introduced by plaintiff, said board determined that the fair cash value of the total capital stock of plaintiff was $262,252,566, and that the proportion of said total value which should be assigned to Kentucky was 35.15 per cent, or $92,181,776. The board further found that the mileage in Kentucky was of greater value, mile for mile, than the mileage of the entire system, or, to be more specific, that a Kentucky mile was of greater value than a system mile, and that this excess value in Kentucky amounted to $2,318,-

224, making the total value of appellants' property in Kentucky $94,650,338.

The board, however, for reasons not clearly given, came to the conclusion that the value of plaintiff's property in the State of Kentucky subject to taxation was not less than $75,159,402, which is less than 80 per cent of the amount found to be the actual value of plaintiff's property in Kentucky, but we must assume that the board reached the conclusion that the porperty of plaintiff in the State of Kentucky subject to taxation was of the value of $75,159,402. From this sum the statutes direct that the assessed value of the tangible property made by the Railroad Commission shall be deducted. The assessed value of the tangible property, as above stated, was $29,500,772, which, when deducted from the total value of plaintiff's property in this State as found by the board leaves a remainder of $45,658,630, which was the value of the so-called franchise of plaintiff in the State of Kentucky subject to taxation for the year 1913 based upon the report for the year ending June 1912.

The assessment of plaintiff's property made for the year 1913 was approximately the same as that for the year 1912, but the assessment for each of these years was very much greater than for any previous years. The 1912 assessment had been attacked in the United States District Court for the Eastern District of Kentucky, and the 1913 assessment, which is the assessment in controversy in this suit, was likewise attacked in the same court. The grounds of attack may be summarized as follows:

ALLEGATIONS OF PLAINTIFF'S BILL OF COMPLAINT AND DEFENDANT'S PLEA.

1. It is alleged in the petition that the assessment and taxing authorities of the State of Kentucky, includ-

ing the State Board of Valuation and Assessment, systematically, habitually, intentionally and designedly assess and have assessed the property of individuals and other corporations for taxation in the State of Kentucky at less than its fair cash value estimated at the price it would bring at a fair voluntary sale, and that said board has intentionally and fraudulently assessed the property of plaintiff, and particularly its franchise, at more than its fair cash value estimated at the price it would bring at a fair voluntary sale, with the result that if taxation is enforced upon the assessment made by said board plaintiff will be compelled to pay on its property a higher rate of taxation than is paid by individual property, and a higher rate of taxation than is paid by other corporate property in the State of Kentucky, and that plaintiff will thereby be denied the equal protection of the laws guaranteed to it by the Constitution of the United States, particularly by Section 1, Article 14, of the Amendments to said Constitution. (Paragraph 7 petition, page 11 printed record.)

2. It is alleged that the taxing and assessing authorities of the State of Kentucky, including defendants, habitually, generally, intentionally and systematically interpret the laws of the State of Kentucky which require that property shall be assessed at its fair cash value as meaning with respect to the property of individuals or natural persons that property shall be assessed at an amount different and less than its actual value, and they assess the property of individuals and natural persons accordingly, but that defendants have assessed the property of plaintiff, particularly its franchise, at more than its fair cash value as such phrase is generally, habitually, intentionally and systematically interpreted by the assessing authorities of the State of Kentucy, thereby depriving plaintiff of the equal pro-

tection of the laws of the State of Kentucky. (Paragraph 7 petition, pages 11, 12 printed record.)

3. It is alleged that the assessing and taxing authorities of the State of Kentucky systematically, habitually, intentionally and designedly assess and have assessed the property of individuals and of corporations not required to report to said State Board of Valuation and Assessment for taxation in the State of Kentucky, at less than its fair cash value estimated at the price it would bring at a fair voluntary sale and at less than 60 per cent of said fair cash value estimated at the price it would bring at a fair voluntary sale, while the said board assessed plaintiff's franchise at more than its fair cash value. (Paragraph 17 petition, pages 46, 47 printed record.)

4. It is alleged that said board in assessing plaintiff's franchise discriminated against plaintiff and made said assessment at a different and higher rate or basis, and by a different method, from that which said board employed at the same time for the assessment of the franchises of other corporations of the same class for the year 1913. (Paragraphs 18 and 19 petition, page 47 printed record.)

5. It is alleged that said board in assessing plaintiff's franchise exceeded the powers delegated to it by any laws of the State of Kentucky, or by any laws under which it assumed to act, and that the assessment is unreasonable, exorbitant, arbitrary and fraudulent, and that the board in making said assessment followed or pursued an erroneous method fundamentally wrong in principle. (Paragraphs 15, 16 petition, page 46 printed record.)

The defendants, constituting said board, specifically deny by answer the allegations set out above, and in addition thereto interpose the pleas—

1. That the plaintiff is a citizen of the State of Kentucky, and that no Federal question is involved in this case, as the statutes under which said board made said assessment are admittedly constitutional, and that for these reasons the Federal courts do not have jurisdiction of this controversy. (Paragraph 25 answer, page 95 printed record.)

2. That this action is a suit against the State of Kentucky, as is shown by paragraph 16 plaintiff's bill, page 46 printed record.

The case was heard in the District Court for the Eastern District of Kentucky, and the judgment of this court will be found commencing on page 110, printed record. The District Judge held that the assessment of plaintiff's franchise for the year 1913 at $45,658,630 was void, but required plaintiff to pay on a franchise valuation of $25,808,493.60, and enjoined the defendants from proceeding to collect any part of the difference between $25,808,493.60 and $45,658,830. The District Court had previously required plaintiff to pay on a franchise valuation of $22,899,300 as a condition precedent to obtaining a preliminary injunction, and the final judgment increases this amount in the sum of $2,909,192.60, and on this additional sum the final judgment of the court directs plaintiff to pay the taxes due. The District Court held:

1. That the board in making the assessment followed a fundamentally wrong method, but also held that in view of the fact that said board might have found a valuation as great as that which it did find by following a correct method, the court declined to set aside the findings of the board on the ground that it had followed a method which, in the opinion of the court, was fundamentally wrong.

2. The District Court held that the Federal courts had jurisdiction of the questions involved in this con-

troversy, because it was a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment to require plaintiff to pay taxes on the fair cash value of its property estimated at the price it would bring at a fair voluntary sale, when, as found by the court, the local assessors throughout the State assessed property at not exceeding 60 per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale.

3. The District Court held that this action is not a suit against the State of Kentucky, and, therefore, is maintainable.

4. The District Court held that the assessment of plaintiff's property in the State of Kentucky should be made on a basis of 60 per cent. of its fair cash value, because the local assessors throughout the State of Kentucky assessed the property of individuals and corporations not assessed by the State Board of Valuation and Assessment at not exceeding 60 per cent. of its fair cash value estimated at the price it would bring at a fair voluntary sale.

In other words, the District Court permitted the valuation of $92,181,766, as found by the board, not including the excess value which the board added to this sum, to stand, and took 60 per cent. of this sum as the amount at which plaintiff's property in the State of Kentucky should be assessed for taxation, which gives the result of $55,309,059.60, and from this sum the court deducted the assessed value of the tangible property in the State, $29,500,772, leaving the value of the franchise, according to the judgment of the court, at $25,808,493.60.

From the judgment of the court the plaintiff appealed, and the defendants have also prosecuted a cross-appeal. The assignment of errors on cross-appeal will be found beginning on page 635 of the printed record, and are as follows:

ASSIGNMENT OF ERRORS.

1.

The Court erred in overruling defendants' motion to dismiss plaintiff's bill on the ground that the District Court had no jurisdiction to hear this case.

2.

The Court erred in overruling the defendants' motion to dismiss on the ground that the bill of complaint shows no equity on its face.

3.

The Court erred in overruling the defendants' motion to dismiss on the ground that plaintiff has an adequate remedy at law.

4.

The Court erred in overruling defendants' motion to dismiss on the ground that the bill states no cause of action against the defendants or either of them under the Constitution and Laws of this State or under the Constitution and Laws of the United States.

5.

The Court erred in overruling defendants' motion to dismiss on the ground that this is a suit against the State of Kentucky.

6.

The Court erred in holding in the decree that plaintiff's property could not be assessed at more than sixty per cent of its fair cash value, estimated at the price it would bring at a fair voluntary sale for the supposed reason or for the reason that other property in the State or a great bulk of the other property in the State is habit-

ually, willfully, intentionally and systematically assessed at not more than sixty per cent of its fair cash value estimated at the price it would bring at a fair voluntary sale.

7.

The Court erred in holding that other property in the State or a great bulk of other property in the State not in the class or the character of property owned by plaintiff is wilfully, habitually, intentionally and systematically assessed at not more than sixty per cent of the fair cash value estimated at the price it would bring at a fair voluntary sale.

8.

The Court erred in holding the Board of Valuation and Assessment of Kentucky followed a fundamentally wrong method in assessing plaintiff's property for taxation.

9.

The Court erred in granting a decree enjoining the collection of taxes by the State of Kentucky and the county and taxing districts in the State, based upon an assessment greater than sixty per cent of the fair cash value of plaintiff's property estimated at the price it would bring at a fair voluntary sale.

10.

The Court erred in holding any part of the assessment made by the Board of Valuation and Assessment of plaintiff's franchise void and in granting a decree enjoining the collection of any part of the taxes based upon an assesment of plaintiff's franchise at the sum of $45,658,630.00.

11.

The Court erred in holding the assesment complained of, is in violation of the Fourteenth Amendment of the Constitution of the United States, thereby denying plaintiff the equal protection of the law.

12.

The Court erred in holding the board pursued an erroneous method in finding the value of plaintiff's franchise and in enjoining the collection of taxes based thereon notwithstanding the Court was of the opinion and belief and so found that the value of plaintiff's property in the State was of greater value than the sum at which it was assessed by the Board.

13.

The Court erred in holding the assesment of plaintiff's property for taxation by defendants was void, because the Board in arriving at its conclusions pursued an erroneous method or employed false reasoning, notwithstanding the Court found the conclusions of the Board as to the value of plaintiff's property in Kentucky, subject to taxation, were correct.

14.

The Court erred in holding that the mileage proportion of plaintiff's lines in Kentucky compared with its mileage within and without the State of Kentucky was 26.4 per cent when in fact the mileage of plaintiff's lines in Kentucky was 35.15 per cent of its lines within and without Kentucky.

15.

The Court erred in holding it was improper for the Board to consider the gross and net income of plaintiff derived in Kentucky when ascertaining the value of plaintiff's franchise therein.

16.

The Court erred in holding that the assessment of the franchise of plaintiff at more than 60 per cent of its real or true value for taxation in Kentucky. when property of other classes in this State was assessed at only sixty per cent of its real value, was in violation of the rights guaranteed to plaintiff under the Fourteenth Amendment of the Constitution of the United States and therefore said assessment was null and void.

17.

The Court erred in holding that defendants were without right to value plaintiff's franchise for taxation in Kentucky at more or at a greater percentage of their value than it had a right to believe other property in Kentucky was assessed at for taxation notwithstanding the fact that the Constitution of the State provides that said Board shall assess the franchise of all railroad companies at their fair cash value and failure to do so would work a forfeiture of their office.

18.

The Court erred in making an assessment of plaintiff's franchise of property of 60 per cent of its real or true value when the Constitution of the State of Kentucky and the laws thereof enacted pursuant thereto require and provide that the franchise or property of all railroad companies in the State shall be assessed for taxation at the fair cash value thereof.

Errors 1, 2, 4, and 5 may be grouped as one, and may be discused under the assignment that the Federal Courts do not have jurisdiction to determine this controversy because no Federal question is involved, and because it is a suit against the State.

The third error assigned must stand alone, and will be discussed under the assignment that the plaintiff had an adequate remedy at law.

Errors 6, 7, 9, 10, 11, 16, 17, and 18 may be treated as one and discussed under the assignment that the State Board of Valuation and Assessment cannot be prevented from assessing the property of railroads at the standard fixed by the Constitution and Statutes of Kentucky because the local assessing officers in the various counties of the State violate the provisions of the Constitution and Statutes, if such is a fact, and assess property at a standard less than that fixed by the law.

Errors 8, 12, 13, 14, and 15 may be treated as one, and discussed under the assignment, did the board follow an erroneous method or a method fundamentally wrong in making the assessment?

THE ASSESSMENT OF PROPERTY FOR TAXATION IN KENTUCKY.

Before determining whether the Board pursued an erroneous method or a fundamentally wrong method in assessing the franchise of plaintiff, it is necessary to briefly refer to the Constitution and Statutes of Kentucky providing for the assessment of property for taxation.

Section 171 of the Constitution of Kentucky, page I., Appendix A, provides that all tax shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax.

Section 172 of the Constitution of Kentucky, page I., Appendix A, provides that all property not exempt from taxation by the Constitution shall be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale. This section further provides that any person authorized to assess values for taxation who shall commit any willful error in the performance of his duty shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office and be otherwise punished as provided by law.

Section 174, Constitution of Kentucky, page I., Appendix A, requires all corporate property to pay the same rate of taxation paid by individual property.

Section 182, Constitution of Kentucky, page I., Appendix A, provides that nothing in the Constitution shall be construed to prevent the General Assembly from providing by laws how railroads and railroad property shall be assessed and how taxes thereon shall be collected.

From the constitutional provisions referred to we find that it is mandatory that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and that all property subject to taxation shall be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale; that any assessing officer who willfully fails to follow the mandates of the Constitution shall be deemed guilty of misfeasance and upon conviction shall forfeit his office. We also find that the property of corporations and the property of natural persons shall pay the same rate of taxation, but the General Assembly may provide how railroads and railroad property shall be assessed, and how taxes thereon shall be collected. This constitutional provision, Section 182, gave the General Assembly the authority to provide a different method of assessing railroad property from that used in assessing other property in the State, and also gave the General Assembly the power to place the assessment of railroads for taxation in the hands of officers other than those who assesses the property of individuals and other corporations.

The County Assessor is a constitutional officer, and he is elected by the people in each county. His duties are defined with great particularity by the Statutes of Kentucky. Section 4020 Kentucky Statutes, page II., Appendix A, defines particularly what property shall be assessed. Section 4044 Kentucky Statutes, page II., Ap-

pendix A, prescribes the oath which the assessor and his deputies shall take before entering upon the discharge of their duties, and in this oath they swear that they will fix the value of all property to be listed by them at its fair cash value estimated at the price it would bring at a fair voluntary sale, without favor or partiality.

Sections 4047 and 4051, Kentucky Statutes, page III., Appendix A, prescribe the oath which the tax payer shall take and penalties which shall be inflicted against any tax payer who wilfully makes a false statement as to his property. Sections 4053, 4058, 4076, 4076a, pages III., IV., IX, Appendix A, prescribe further regulations for the assessing of property by the County Assessor.

From an examination of these sections it will be seen that the County Assessor assesses the great bulk of all the property in the State. Probably 80 per cent. of the property assessed for taxation is assessed by these local assessors, and the State Board of Valuation and Assessment, whose duty it is to assess the property of railroads, has no control, either directly or indirectly, over the assessments made by the local County Assessors, and neither does this board have any knowledge or information as to what has been done by such assessors, except as it may obtain information through the report of the State Board of Equalization. The County Assessor visits the individual tax payers in his county, and on a prescribed form which is furnished by the State of Kentucky, he obtains information as to the property owned by the taxpayer, and its value. After the assessor in the county has completed his work, that is, after he has visited all the tax payers in the county and obtained their schedules containing the information which the State requires them to give, he makes up his assessor's book, which is a compendium or a compilation of the individual lists given by the tax payers as assessed by the County Assessor.

After he has made up his assesor's book he reports them to the County Clerk of the county and the County Clerk turns them over to the County Board of Supervisors.

Section 4115, Kentucky Statutes, page IX., Appendix A, empowers the County Judge to appoint a Board of County Supervisors. Section 4117, Kentucky Statutes, page IX., Appendix A, prescribes the oath which these supervisors shall take, and in this oath the members of said board swear that in each instance where the property has not been assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale, they will increase or decrease the value and fix the value at what they believe the property would bring at a fair voluntary sale. This board of local supervisors appointed by the County Judge meets at the county seat in the month of January, and they take up the work of the County Assessor as shown by the assesor's books which have been made out by the assessor and turned over to the County Clerk. This board is supposed to be made up of intelligent men residing in different parts of the county, who are familiar with the values of property in the county. They hold sessions at which they scan each individual list reported by the County Assessor, and where, in their opinion, the property of a tax payer has been under-assessed they make what is termed a raise in the value of his property and send out a notice to the individual tax payer notifying him to appear before the board at a date mentioned in the notice so that he may protest against the raise, if he so desires. If the individual tax payer does not appear the raise is made by the board, but, on the other hand, if he does appear he and his witnesses are heard and the board passes upon the question as to whether the raise is justified.

After the Board of Supervisors has gone through the entire list of tax payers in the county, and has completed

its work it makes out the tax books which show the amount of property subject to taxation which each tax payer in the county owns. These tax books are turned over to the County Clerk and the County Clerk makes up a recapitulation of them which is forwarded to the State Board of Equalization.

The State Board of Equalization is provided for in Section 4268, Kentucky Statutes, page II., Appendix A. The Governor appoints this board, which consists of one member from each Appellate District in the State, and as there are seven Appellate Districts in the State the board is made up of seven members with the Auditor of Public Accounts acting as the chairman. By the provisions of Section 4269, Kentucky Statutes, page X., Appendix A, each member of said board is required to take the oath or affirmation prescribed by the Constitution of the State, that is, each member must take an oath that he will faithfully discharge the duties of the office which he holds. This board meets at the State Capitol in the month of February in each year, and when it meets the Auditor of Public Accounts turns over to the board the recapitulation of the tax books of the various counties. Section 4274, Kentucky Statutes, page X., Appendix A, makes it the duty of the State Board of Equalization to fix the percentage of assessed value of real property at its fair cash value, and all counties whose average list of real property falls below such value shall be raised to the same, and all those counties whose average lists are above the same shall be lowered to said cash value. By the provisions of Section 4275 Kentucky Statutes, page X., Appendix A, said State Board of Equalization has the same power over the equalization of personal property as it has over the equalization of real property. This board examines the assessed value of the property in all the counties and where it finds that a county has not assessed its property as a whole at its fair cash value

it is the duty of the board to raise the assessment in that county, and when it has made such raise it notifies the County Judge of the county, who may appoint persons to appear and make objections to the proposed raise. The State Board hears any witnesses that may be introduced and at the conclusion of the testimony, and after consideration, it enters an order either sustaining the raise in whole or in part, or showing that no raise is justified.

The reference we have made is to the assessment of property for taxation by the local County Assessors, but this controversy does not grow out of an assesment made by local County Assesors but out of an assesment made by the State Board of Valuation and Assessment. Railroad property is not assessed by the County Assessors. By the provisions of Section 4096, Kentucky Statutes, page XI., Appendix A, each railroad doing business in this State is required to make a report to the Auditor on or before the first of August in each year. The Auditor turns this report over to the Railroad Commission, as is provided in Section 4098, Kentucky Statutes, page XI., Appendix A, and the Railroad Commission fixes the value of the tangible property of railroads in the State of Kentucky for taxation, but the Railroad Commission does not assess all the property of railroads, as its power is confined strictly to the assessment of the tangible property. It is wholly immaterial, so far as the final result is concerned, as to the action taken by the Railroad Commission, because the value of the tangible property must be eventually deducted from the total value of the property of the railroad in the State of Kentucky. If the value of the tangible property is high the value of the franchise will be low, and if the value of the tangible property is low the value of the franchise will be high.

Section 4077, Kentucky Statutes, page XI., Appendiv A, provides for what is called a franchise tax. By the provisions of Section 4078, Kentucky Stautes, page

XII., Appendix A, each railroad engaged in business in this State must make a report to the Auditor between the 30th day of June and the first day of October in each year. and this report is considered by the State Board of Valuation and Assessment in arriving at the true value of all the property of the railroad in the State of Kentucky. Sections 4079, 4080, 4081, 4082, 4083, 4084, 4086, 4090, 4091 Kentucky Statutes, pages XIII., XIV., XV., Appendix A, prescribe the duties of the State Board of Valuation and Assessment. In the assessment of railroad property it is the duty of this board to ascertain the entire value of the property of a railroad in this State, and when this value is ascertained the assessed value of the tangible property is deducted from it, and the remainder is what is known as the franchise value. The amount of taxes due the State of Kentucky on this franchise value must be paid into the State Treasury direct by the railroad within thirty days after final assessment, and the taxes due the counties, towns, municipalities and taxing districts are certified by the Auditor to the proper authorities, and the railroad pays the taxes to the proper authorities in such counties, towns, municipalities and taxing districts.

DID THE STATE BOARD OF VALUATION AND ASSESSMENT ACT WITHIN THE LAW IN ASSESSING PLAINTIFF'S PROPERTY FOR TAXATION FOR THE YEAR 1913?

It is charged in the petition that the State Board of Valuation and Assessment acted fraudulently in making this assessment, but as no proof was introduced tending to substantiate this charge, and as the District Judge does not base his opinion upon the ground that the assessment was fraudulent, we shall not discuss that allegation in the petition.

It is alleged in the petition that the board followed a fundamentally wrong method in making the assessment, and while the District Court found that this allegation was sustained, the opinion holding the assessment void is not based upon this allegation. In other words, in the opinion of the District Court, notwithstanding the board followed an erroneous method in ascertaining the total value of plaintiff's property in this State, the assessment was not void for that reason because an amount as great as that ascertained by the board might have been found if the board had pursued a proper method. The judgment of the board best speaks for itself. There is nothing left to conjecture. If the board pursued an illegal method that fact will be disclosed by an examination of its final order which was entered in making the assessment of plaintiff's property for the year in controversy. The order of the board is as follows:

"The Board of Valuation and Assessment met on November 17, 1913, in the State Capitol, for the purpose of considering the protest filed by the Louisville & Nashville Railroad Company, and for the purpose of hearing this company's *complainant* against the tentative assessment of its franchise for taxation for the year 1913, and there were present as members of said board H. M. Bosworth, Auditor of Public Accounts: Thomas S. Rhea, Treasurer, and C. F. Crecelius, Secretary of State, and the following proceedings were had:

"On motion it was ordered that James Garnett, Attorney General, be requested to attend said board at its meetings and advise with it in its proceedings. Thereupon, came Colonel Henry L. Stone, W. A. Colston, and Mr. Robert E. Fleming, attorneys for the Louisville & Nashville Railroad Company, and presented their written complaint and objections to the tentative assessment of said corporation, to which were attached several questions propounded to said board by said attorneys representing said corporation, which complaint was ordered filed, and in order that said board might prepare a writ-

ten answer to the questions so propounded, by agreement of parties, the hearing was continued until November 20th, and on November 20th, the board met pursuant to adjournment, when it presented to the counsel for the Louisville & Nashville Railroad Company the answers to the questions which had been propounded to the board, which answers were filed, and thereupon, complainant produced its witnesses and evidence, stenographic notes of which were at the time made by a stenographer furnished by said corporation, and a transcript of the evidence was made and furnished to the board and filed and made a part of its records. Not being able to complete the taking of evidence, the hearing was by agreement adjourned from time to time, as shown by the transcript, until said hearing was completed, and the board then continued said meeting from day to day until the 23rd day of December, 1913, when it made and adopted the following findings:

"In ascertaining the value of the corporate franchise of a railroad company operating lines of railway in Kentucky and elsewhere, the Board of Valuation and Assessment conceives it to be its duty to first ascertain the fair cash value of the capital stock of all the assets of the corporation under consideration, and then to ascertain the proportion thereof which the mileage of said company in this State bears to the mileage within and without the State, which proportion the board should consider in fixing the value of the corporate franchise, and from the value of that proportion of the capital stock in Kentucky should be deducted the assessed value of all tangible property assessed in this State or counties where situated. The remainder thus found will be the value of the corporate franchise.

"The board is of the opinion, and believes the fair cash value of the capital stock of a railroad company can be more accurately ascertained in most instances by capitalizing the net income of the corporation. In order to employ this method, the board must first ascertain the net income of the corporation under consideration. To ascertain the net income of respondent, the board considered the report made by it to the Auditor as of June 30, 1912, its annual report to stockholders,

and to the Kentucky Railroad Commission and the Interstate Commerce Commission, and the testimony of George W. Lamb given before the board at the hearing on the tentative assessment. (See Exhibit No. 2.)

"THE NET EARNINGS OF THE L. & N. R. R. Co.

The total income of the L. & N. R. R. Co. for the year ending June 30, 1912, as shown by testimony of G. W. Lamb. (See exhibit No. 2) is	$16,201,150
The total net income of the L. & N. R. R. Co. for the year ending June 30, 1912, as shown by the report of that company to the Auditor, is	15,882,188
The total net income of L. & N. R. R. Co., as shown by report to Kentucky Railroad Commission, which is the same as made by the company to the Interstate Commerce Commission (see testimony—George W. Lamb), is	18,052,905
This includes income of roads operated for account of owners whose earnings are not available to the L. & N. R. R. Co., to-wit:	
South & North Alabama	1,401,708
Glasgow Railroad Co.	31,847
Elkton & Guthrie R. R. Co.	6,049
Total	$ 1,439,604
Deduct	1,439,604
Total income of L. & N. R. R. Co. available for corporate purposes	$16,613,301

"It will be observed from the foregoing that the several reports of respondent as to its net income do not agree. Therefore, the board must determine the true amount of the net income of respondent from evidence before it, and the opinion of the board is that the return of respondent to the Kentucky Railroad Commission and the Interstate Commerce Commission correctly states its net income available for corporate purposes for the year ending June 30, 1912.

These reports state the net income of respondent to be	$18,052,905
From which deduct net earnings of roads operated for account of owners (see report to Ky. Railroad Commission, page 39)	1,439,604
Total net income of L. & N. R. R. Co. available for corporate purposes	$16,613,301

"It is estimated by respondent that if the capitalization of net earnings plan is to be used for the purpose of ascertaining the value of the capital stock of respondent, the average net earnings of respondent for a period of at least five years should be used to ascertain a fair result; that the consideration of the net earnings of respondent for any one year does not accurately show the real value of its assets. This theory is not applicable to this case, for the reason that the mileage of the company has increased from year to year for the last ten years. The average operated mileage of the company for the years 1902 and 1903 was 3,438.93; for the years 1911 and 1912, 4,709.93 (see report to stockholders). In the last five years the company acquired 362 miles. The mileage in Kentucky in 1907 was 1,232.82 miles, and in 1911 it was 1,487.4, and in 1912 it was 1,574 miles. (See bill of L. & N. R. R. Co. v. Bosworth, page 51. See report to stockholders. See Exhibit No. 28, G. W. Lamb.)

"If the mileage of the company within and without the State had been the same during the last five years, the claim of respondent that the average net earnings for the last five years should be considered would be more tenable. It is insisted that the net income of the company should not be capitalized at so low a rate as 6 per cent., because investors in railroad property are entitled to earn more than 6 per cent. on their investment, and the legal rate of interest in other States through which the L. & N. Railroad operates its lines is higher than 6 per cent., but we find no merit in this contention.

"THE DEDUCTION OF THE VALUE OF NON-TAXABLE PROPERTY.

"It is claimed by respondent that the board should, if it ascertains the total value of the capital stock of respondent by capitalization of net income, deduct from total net income so much thereof as accrues from its investments in securities non-taxable in Kentucky, and so much thereof as arises from rents received for lines owned in fee, but leased to and operated by other companies. The deductions claimed are set out in Note D on page 2 in report to Auditor, and on page 39 of the report to the Railroad Commission. We are in doubt as to the correctness of this claim as to the rent received by respondent for Paducah & Memphis Division and Clarksville & Princeton Branch, amounting to $218,545, but, to be sure that no injustice is done, we will allow this deduction. The other deductions claimed are proper, with the exception of the item of $70,953 received from Lexington & Eastern Railway Company. This amount was paid to the L. & N. by the Lexington & Eastern Railway Company as interest on bonds, and must be considered in fixing the value of the franchise of the L. & N. R. R. Company. The deductions claimed will be allowed with this exception, and they amount to $878,147.

"MILEAGE.

"The Louisville & Nashville Railroad Company owns, operates, leases and controls 4,478.61 miles of railroad in Kentucky and elsewhere. In addition to this it operates for account of owners 220.88 miles. Those lines operated by respondent for account of owners are owned by another company and are separately taxed. The income and revenue arising from those lines operated for account of owners is collected by respondent, but accounted for and paid over to the companies owning those lines. The respondent owns shares of stock in other railroad companies which operate their own property under their own corporate management, and are separately taxed. The income and revenues of those companies in which respondent owns shares of stock is not the income and revenues of respondent and is not available to it for any purpose. The total mileage of those companies

is 2,937.89 miles, 286, or one-tenth, of which are in Kentucky, and 2,651, or 90 per cent., of which are outside of Kentucky. The respondent claims that in ascertaining the ratio of mileage owned, operated, leased and controlled by it in Kentucky, to that owned, operated, leased and controlled within and without Kentucky, that the mileage of those companies in which it owns shares of stock should be considered, but that none of the assets of those roads should be considered when finding the value of the capital stock of respondent; that the ratio thus found should be applied to the capital stock of respondent to ascertain the mileage proportion thereof in Kentucky. We are of the opinion that if the mileage of those companies is to be considered in finding the mileage ratio of respondent in Kentucky for the purpose of ascertaining the mileage proportion of the capital stock in Kentucky, then the assets or capital stock of those companies must also be taken into account and considered in order to find the true mileage proportion of the value of capital stock of respondent in Kentucky on the mileage basis.

"If respondent had invested in the shares of an industrial corporation instead of investing in the shares of railway companies, the mileage ratio of respondent's road in Kentucky would undoubtedly be 35.15. If the respondent should divest itself of the ownership of the shares it owns in other railway companies operated under separate management and separately taxed, then unquestionably the ratio of mileage in Kentucky to that within and without Kentucky would be 35.15.

"We also are of the opinion that in order to ascertain the proportion of the capital stock of the respondent in Kentucky on the mileage basis, those miles of road owned, operated, leased and controlled by respondent within and without Kentucky whose income and revenue accrue to the L. & N. R. R. Co., and which are available to it for its corporate use and purposes, should be considered. We find upon consideration thereof that the miles of road owned, operated, leased and controlled by respondent in Kentucky and elsewhere whose income and revenues are available to and belong to the L. & N. Railroad Company, and are applicable for all purposes of that company, none of which lines are separately operated or separately taxed, embrace and con-

sist of 4,478.61 miles in Kentusky and elsewhere, 1,574.47 miles of which are in Kentucky, and the remainder, 2,904.14, are outside of Kentucky, and the ratio of mileage of respondent in Kentucky on this basis to that in Kentucky and elsewhere, is 35.15 per cent. The said mileage does not embrace or include those lines operated for account of owners by respondent, which lines are separately taxed, and the revenues from which are not available to nor do they belong to respondent; nor does it embrace or include any mileage of those lines of road in which this company owns shares of stock.

"We find respondent owns shares of stock in seven other railway companies, which companies operate and own their own lines of railway and are separately taxed, and the income and revenues arising from the operation of said lines do not belong to and are not available to respondent. Said roads are as follows (see report to stockholders, page 5):

Nashville, Chattanooga & St. Louis Ry.
(A majority of the capital stock owned.)
Central Transfer Railway & Storage Co., Louisville.
(One-half of the capital stock owned.)
Chicago, Indianapolis & Louisville Ry.
(A majority of the capital stock owned jointly with the Southern Ry.)
Louisville, Henderson & St. Louis Ry. less mileage of L. & N. R. R. operated under trackage arrangement.
(A majority of the capital stock owned.)
Woodstock & Blocton Ry.
(One-half capital stock owned.)
Lexington & Eastern Ry.
(All capital stock owned.)
New Orleans, Mobile & Chicago R. R.
(A majority of the capital stock owned jointly with the St. Louis & San Francisco R. R. Co.)

"We find that respondent does not control said lines and only owns a majority of the shares of stock in three of said companies, to-wit: Nashville, Chattanooga & St. Louis Railway; Louisville, Henderson and St. Louis Railway, and Lexington & Eastern Railway; that the respondent in its protest admits that it does not

have access to or control over the accounts of said companies and does not know the value of their assets and property. Considering the aforesaid 2,937.89 miles of road operated and separately taxed as mileage of respondent, the ratio of mileage in Kentucky of respondent to the mileage within and without Kentucky is 24.6, we are of the opinion, and find the mileage proportion of the capital stock of the Louisville & Nashville Railroad in Kentucky may be ascertained by finding 35.15 per cent. of the total assets of the L. & N. R. R. or by finding 24.6 per cent. of the total assets of the L. & N. R. R. Company, and those companies in which it owns shares of stock the lines of which are operated by their owners and are separately taxed. We find from the evidence that the lines held in the name of the Madisonville, Hartford & Eastern, the Wasioto & Black Mountain and the Morganfield & Atlanta are not operated by those companies and are not separately taxed; that those lines are embraced in and are an integral part of the L. & N. R. R. Company, and the Revenues arising from the operation of said lines belong to respondent, and were included in its report of earnings.

OTHER FACTS TO BE CONSIDERED IN FINDING THE VALUE OF CORPORATE FRANCHISE SUBJECT TO TAXATION.

"In fixing the value of the corporate franchise of a railroad company, the Board must consider that proportion of the capital stock thereof which the mileage in the State bears to the mileage within and without the State, the gross and net income within and without the State, the surplus fund and undivided profits, if any, and the Board may consider any other evidence that will aid in determining the true value of the capital stock of such corporation.

"We find from the evidence that the gross revenue of respondent for the year ending June 30, 1912, derived in Kentucky is:

Intrastate	$ 6,123,626⅜
Interstate	15,330,029
Total	$21,453,655

(See page 45 of the report to Kentucky Railroad Commission.)

"We find the total gross revenue of the L. & N. Railroad for the fiscal year ending June 30, 1912, to be $56,311,788. The ratio of gross earnings of respondent in Kentucky to total gross earnings is 38 plus per cent. We find from the evidence that the net earnings of respondent in Kentucky for the year ending June 30, 1912, are $6,514,442; that the total net earnings for the whole system for the year are $16,623,976; that the ratio of net earnings in Kentucky to entire net earnings is 39 plus. We find the net operating revenue per mile of respondent on its entire line is $3,521 per mile (see report to stockholders, page 93 Kentucky Railroad Commission). We find the net operating revenues per mile of road of respondent on its lines in Kentucky is $4,373 per mile (see report to Kentucky Railroad Commission, page 93a); that the net operating revenue per mile of respondent in Kentucky is $752 more than the average earnings per mile of its entire line. The percentage of expense to operating revenue of entire line is 70.49 (see report to stockholders, page 7; report to Railroad Commission, page 65); that the percentage of expense in Kentucky to operating revenues of entire line is 67.05 (see report to Kentucky Railroad Commission, page 65.)

"We find the cost of reproduction of road and equipment in Kentucky as of June 30, 1905, was $70,599,484. The total mileage in Kentucky, June 30, 1905, was 1,234 miles (see bill of L. & N. R. R. v. Siler, U. S. District Court). We find the cost of reproduction of road and equipment in Kentucky on June 30, 1912, was $85,983,034. The total mileage in Kentucky June 30, 1912, was 1,574 miles (see testimony and exhibit No. 28 George W. Lamb). The total increase in mileage in Kentucky from June 30, 1905, to June 30, 1912, was 340 miles. The respondent claims a charge for depreciation on its road in Kentucky since June 30, 1907, amounting to $3,542,106. The depreciation charged by respondent to all its lines in Kentucky and elsewhere since June 30, 1907 is $4,323,621. According to this statement the road of respondent in Kentucky, which is 35.15 per cent. of its total, has depreciated in value

$3,542,106, in the last five years, while the remainder of the road, 65 per cent. of the whole, has depreciated in value only $781,515 (for charge of depreciation of road since June 30, 1907, see report to stockholders, page 20.)

VALUATIONS.

"To enable the Board to determine the total value of the capital stock of respondent in Kentucky and elsewhere, and the mileage proportion thereof in Kentucky, the Board considered and used the following computations in connection with the evidence introduced by respondent:

Net earnings of L. & N. R. R.		$ 18,052,905
Deduct net earnings of North & South Alabama	$1,401,708	
Glasgow R. R. Co.	31,847	
Elkton & Guthrie R. R.	6,049	
		1,439,604
Balance		$16,613,301
Deduct income from nontaxable securities (See report to Railroad Commission, page 39); (See report to Auditor)		878,147
Balance		$15,735,154
Total value of capital stock of L. & N. R. R. arrived at by capitalizing net income at 6 per cent.		$262,252,566
Kentucky's proportion of the capital stock on mileage basis of 35.15 per cent.		92,181,776
80 per cent. Kentucky's proportion of the capital stock		73,745,421
Deduct assessed value of tangible property in Kentucky		29,500,772
Value of franchise on this basis		$ 44,244,649
Kentucky's proportion on gross earning basis, 38 plus per cent.		99,655,975
80 per cent. of Kentucky's proportion		79,724,780
Deduct assessed value of tangible property in Kentucky		29,500,772
Value of franchise		$50,244,008

"The total value of the mileage proportion of the capital stock of the L. & N. R. R. Company in Kentucky arrived at by considering mileage and assets of the L. & N. R. R. Company and mileage and assets of those roads in which it owns shares of stock, arrived at by capitalizing net income at 6 per cent., is as follows:

Total value of capital stock of the L. & N. R. R. Co.	$262,252,566
Of the New Orleans, Mobile & Chicago	9,661,300
Chicago, Indianapolis & St. Louis	27,496,900
Louisville, Henderson & St. Louis	4,390,800
Nashville, Chattanooga & St. Louis	49,191,600
North & South Alabama	25,269,600
Georgia Railroad Co.	14,596,900
Lexington & Eastern	3,198,200
Total	$396,057,866
Kentucky's proportion on mileage basis, 24.6	96,430,245
80 per cent. of Kentucky's proportion	77,944,196
Less assessed value of tangible property in Kentucky	29,500,772
Value of franchise	$48,443,424

"The report of the L. & N. Railroad Company shows the net rail operating revenue of the company to be $13,190,947. This does not include income from any other source. Capitalizing this sum at 6 per cent. gives value of road and equipment as a carrier of freight $219,849,116.

Kentucky's proportion of value of road and equipment on mileage basis, 35.15		$ 77,276,964
Add total value of intangible property, stocks, bonds, moneys and credits, to-wit:		
Bonds	$12,538,049	
Stock in foreign corporations taxable in Ky.	4,219,491	
Loaned to proprietary companies for construction and equipment	7,992,897	

Advanced to affliated companies	6,294,540	
Special deposit	862,135	
Total		$ 31,907,112
Total value of property in Kentucky		$109,795,952
80 per cent. of value of property in Kentucky		87,347,260
Less assessed value of tangible property in Kentucky		29,500,772
Value of franchise		$57,846,498

"In arriving at the basis for estimate of value of the capital stock or property of respondent, the Board has considered the cost of construction of road and equipment and cost of reproduction thereof, the real value of its stocks and bonds and the gross and net earnings thereof within and without Kentucky, and all other matters appertaining thereto as shown by the proof, that would assist the Board in arriving at the fair cash value thereof, and upon consideration of all the foregoing and after hearing the argument of counsel for respondent, and after having taken time to thoroughly consider all matters brought out in the hearing, it is now adjudged and determined by the Board of Valuation and Assessment of Kentucky that the fair cash value of the total capital stock of the L. & N. R. R. Co. is:

	$262,252,566
That the proportion of the capital stock in Kentucky on the mileage basis 35.15 is	92,181,776
But the Board found that the excess value in Kentucky over this sum as shown by the proportion of the capital stock in Kentucky on the gross income basis is	7,472,199
And that the excess value found in Kentucky by using the net income ratio is	10,096,624

"Following the plan suggested by Judge Cochran in his opinion recently handed down in the case of L. &

N. Railroad Company v. Bosworth on hearing for a preliminary injunction, we ascertained the excess value as follows:

The entire value of the tangible property of the L. & N. R. R. Co. within and without Kentucky as shown by the report to the Auditor is	$177,038,113
The total value of the capital stock as found by the Board is	262,252,566
From which deduct	177,038,113
And the value of the intangible property of the L. & N. R. R. within and without Kentucky is found to be	85,214,453
The mileage proportion of the tangible property, 35.15	62,228,896
The gross income proportion of the intangible property, 38	32,421,492
Value of capital stock in Kentucky	94,650,388

"Therefore, the Board of Valuation and Assessment places the excess value in Kentucky over the value found on the mileage basis at $2,318,224, and fixes and determines the value of Kentucky's proportion of the entire capital stock of the respondent at $94,500,000, but to be conservative, and out of an abundance of caution to the end that no injustice may be done respondent in arriving at the value of the corporate franchise of respondent in this State, the Board has considered less than 80 per cent. of that which it believes to be the fair cash value of Kentucky's proportion of the entire capital stock of respondent, and it is now ordered that the value of the capital stock of the L. & N. Railroad Company in Kentucky for the year 1913 be fixed at $75,159,402, which, in the opinion of the Board, is less than 80 per cent. of its fair cash value, and from this sum there is deducted the assessed value of the tangible property, to-wit: $29,500,772, and the remainder, to-wit: $45,658,630, is adjudged to be the value of the franchise of the L. & N. Railroad Company in Kentucky subject to taxation for the year 1913.

"Upon the question of adopting the foregoing order:

"Bosworth voted 'yes.'
"Rhea voted 'yes.'
"Crecelius voted 'yes.'

"The Secretary of the Board is directed to notify the L. & N. R. R. Co., of the adoption of the foregoing order and furnish it with a copy thereof.

"Bosworth, Chairman.
H. M. Bosworth."

The State Board of Valuation and Assessment in this finding shows a splendid understanding of the methods of assessing the property of railroad companies in the State of Kentucky. The first paragraph of the findings shows what the Board conceives to be the task it must perform. In that paragraph the Board thus states the basic principle of assessing railroad property in this language:

"In ascertaining the value of the corporate franchise of a railroad company operating lines of railway in Kentucky and elsewhere, the Board of Valuation and Assessment conceives it to be its duty to first ascertain the fair cash value of the capital stock of (or) all the assets of the corporation under consideration, and then to ascertain the proportion thereof which the mileage of said company in this State bears to the mileage within and without the State, which proportion the Board should consider in fixing the value of the corporate franchise, and from the value of that proportion of the capital stock in Kentucky should be deducted the assessed value of all tangible property assessed in this State or counties where situated. The remainder thus found will be the value of the corporate franchise."

Under this principle, which is unquestionably sound, it was the duty of the Board to first ascertain the fair

cash value of the capital stock of plaintiff, that is, the total value of all of the assets of the corporation. The Board states in its findings that it believes that the fair cash value of the capital stock of a railroad company can be more accurately ascertained in most instances by capitalizing the net income of the corporation. Having this view the Board first sought to ascertain the correct net income of plaintiff for the year ending June 30, 1912. At the outset it was confronted with statements made by the plaintiff showing its income for the year ending June 30, 1912, which statements were in conflict. G. W. Lamb, second assistant comptroller of plaintiff, testified before the State Board of Valuation and Assessment and submitted numerous exhibits, probably as many as thirty, showing or purporting to show the value of the property of the L. & N. Railroad.

Exhibit No. 2, filed by George W. Lamb and considered by the Board, will be found on Page 388, printed record.

The net income as shown by this statement was	$16,201,150
The total net income of plaintiff as shown by its report to the Auditor for the year ending June 30, 1912	15,882,188
The total net income of plaintiff as shown by report to Kentucky Railroad Commission and to the Interstate Commerce Commission was	18,052,905

but the last mentioned reports include the income of roads operated for account of owners whose earnings are not available to plaintiff, to-wit:

South & North Alabama	$1,401,708	
Glasgow Railroad Co	31,847	
Elkton & Guthrie R. R. Co	6,049	
Total	$1,439,604	
which deducted from		$18,052,905
leaves a balance as to the total net income available for corporate purposes of		16,613,301
The board after a consideration of each of these reports and the testimony relating thereto took the net earnings as reported to the Interstate Commerce Commission and the Kentucky Railroad Commission, to-wit		18,052,905
and deducted from it the net income of the South & North Alabama, Glasgow Railroad Co., Elkton & Guthrie R. R. Co., aggregating		1,439,604
which leaves a balance of		16,613,301
From this sum the board proceeded to deduct what it considered the income from non-taxable securities held by plaintiff, and this income aggregated		878,147
which when deducted from $16,613,301 leaves a balance of		$15,735,154

as the net income of the plaintiff which should be capitalized by the board in order to ascertain the entire value of plaintiff's capital stock. Capitalizing the sum of $15,735,154 at 6 per cent gives the total value of the capital stock of plaintiff $262,252,566.

That the value of plaintiff's entire property as a railroad system is as much as this sum is not seriously questioned even by plaintiff. As we use the words "capital stock" in relation to the assessment of franchises of railroads it embraces and comprehends the real, personal, tangible and intangible property of the

corporation. We use it in the sense that it means the total value of all the property of the corporation, and that this is the correct meaning of the words as used in our statutes is too well settled to admit of argument. This construction was placed upon these words in the case of Henderson Bridge Company vs. Commonwealth, 99 Ky., 633, as well as in the late case of Commonwealth vs. United States Express Company, 149 Ky., 755. To the same effect is the opinion of the Kentucky Court of Appeals in cases of—

Commonwealth vs. Ledman, 127 Ky., 621.
Commonwealth vs. Ingalls, 121 Ky., 201.
Commonwealth vs. Cumberland Telephone & Telegraph Company, 30 Ky. Law Rep., 724.

Said board found that the proper proportion of the total value of plaintiff's property in the State of Kentucky was 35.15 per cent., and applying this percentage to the total value gives to Kentucky a value of $92,181,776. 35.15 per cent. of the total value of plaintiff's entire capital stock is the percentage in Kentucky on what is called the mileage basis. The board found by reference to the report made by plaintiff to the Kentucky Railroad Commission that the proportion of business done in Kentucky based upon the gross earnings in Kentucky and for the whole system was 38 per cent., and using the gross earning basis of apportionment to Kentucky, the board found that the value of plaintiff's property in Kentucky was $99,655,975. An explanation of the report of plaintiff to the Kentucky Railroad Commission as made by the plaintiff will be found in the evidence beginning on page 327, printed record.

The board also made further calculations to ascertain the value of plaintiff's entire capital stock. It was insisted by the plaintiff that the board should include

what is termed controlled mileage, that is, mileage of railroads in which the plaintiff owns any part of the capital stock, either individually or jointly with some other road. The board insisted that if it should bring in the so-called controlled mileage that it would be necessary for it to also bring in the value of the capital stock of such controlled roads. In other words, if the mileage of the controlled roads was considered in determining the proper percentage to apportion to Kentucky, this mileage would draw out of Kentucky values properly belonging in Kentucky unless this was prevented by including the total value of the capital stock of such controlled roads. The board's position was that if the plaintiff brought in the mileage of those roads it must also bring in the value of the capital stock of those roads.

In an effort to ascertain what the result would be by accepting the contention of plaintiff and apportioning to Kentucky on the basis of 24.6 per cent., the board ascertained in the best way it could the value of the capital stock of the so-called controlled roads, to-wit:

New Orleans, Mobile & Chicago.
Chicago, Indianapolis & St. Louis.
Louisville, Henderson & St. Louis.
Nashville, Chattanooga & St. Louis.
North & South Alabama.
Georgia Railroad Company.
Lexington & Eastern.

By adding the value of the capital stock of these roads and the value of the capital stock of the L. & N., to-wit, $262,252,566, the board found that the value of the capital stock of the entire system of plaintiff, including the controlled roads, was $396,057,866, and apportioning to Kentucky on the basis of 24.6 per cent. gave to Kentucky $96,430,245, which is slightly more than the appor-

tionment of the value of the capital stock of plaintiff, exclusive of the controlled roads, apportioned on the basis of 35.15 per cent. In one instance the value of plaintiff's property in Kentucky is shown to be $96,430,-245, while in the other it is shown to be $92,181,776. The board made this calculation in order to demonstrate that the difference between accepting the contention of the plaintiff that the proper ratio of apportionment was 24.6 was not materially different if the value of the capital stock of the controlled roads was included, from the apportionment on the ratio of 35.15 per cent. without including the capital stock of the controlled roads.

The board, as shown by its findings copied above, made a number of calculations in an effort to ascertain the true value of plaintiff's property in the State of Kentucky. It is only necessary to read the final report of the board to show that it had given careful consideration to every element which was necessary in arriving at a proper conclusion as to the value of plaintiff's property in the State of Kentucky. It is true that after the board had determined that the value of that proportion of plaintiff's capital stock which is in Kentucky was not less than $92,181,776, in response to a suggestion in the opinion of the District Judge in a previous case, the board endeavored to prove whether there was an excess value of plaintiff's property in Kentucky, or, to be more definite, to ascertain whether the property of plaintiff in Kentucky, mile for mile, was of greater value than the entire property of plaintiff, mile for mile. In following this line of reasoning the board ascertained that there was an excess value in Kentucky amounting to $2,318,-224, which was added to the aforesaid sum of $92,181,776, which gave as the value of plaintiff's property in the State of Kentucky $94,650,388. The board then concluded its findings by stating that, in its opinion, the value of plaintiff's entire capital stock in the State of

Kentucky was not less than $94,500,000, but for some reason not clearly explained the board fixed the entire value of plaintiff's property in the State of Kentucky at $75,159,402.

The only real question to consider in this case, according to the contention of defendants, is whether the value of the property of plaintiff in the State of Kentucky is worth as much as $75,159,402. The plaintiff charges that the assessment of its property in the State of Kentucky at the sum of $75,159,402, which gives a franchise value of $45,658,630, after deducting the assessed value of the tangible property, $29,500,772 is unreasonable, excessive, fraudulent, capricious and arbitrary, and repeats the charge time after time in the petition. If the assessment is excessive, which we most earnestly deny, it was the duty of plaintiff to show by conclusive evidence that such is true. We insist that the calculations made by the board, and the evidence considered by the board, show that the property of plaintiff in Kentucky is worth much more than the sum at which it was fixed by the board. The plaintiff does not seriously contend that the board fixed the total value of its capital stock at more than its worth, but it is contended most earnestly by the plaintiff that the board should have apportioned to Kentucky strictly on the mileage basis, and that after having ascertained the total value of the capital stock of plaintiff it should have apportioned 24.6 of that value to Kentucky, and no more. We insist that under the provisions of the Constitution and the laws of this State the board must assess all the property in the State of Kentucky which is subject to taxation, and that the board was not confined strictly to the mileage basis in making such assessment. We also insist that the mileage basis is 35.15 and not 24.6 per cent.

The mileage of plaintiff is fully shown in two exhibits filed by George W. Lamb, a witness for plaintiff.

The first of these is Exhibit No. 28, and will be found on page 431, printed record, and the other is Exhibit No. 29, and will be found on page 439, printed record.

The difference between the contention of plaintiff and the contention of the board is that the plaintiff insists that what it terms the controlled mileage should be included, while the board insists that no mileage should be included except the mileage where the income is available to the plaintiff for dividends, interest on bonds, and to pay operating expenses. If the contention of the board is correct, then the proper percentage is 35.15, and this is admitted by plaintiff. On page 365 of the printed record, the witness, Lamb, makes this statement:

"The L. & N. Railroad has in Kentucky a mileage of 1,568.01 miles on which the operating revenues are taken in as earnings of the L. & N. system, and are subject to any recounting that may be called for by the roads which are separately shown as being separately taxed in the State of Kentucky. The percentage to Kentucky of the roads here referred to would be 35 plus, not excluding the mileage separately taxed, and by excluding the mileage separately taxed it would be 32 plus."

He was then asked this question:

"Then if you exclude the Morganfield & Atlanta, the Madisonville, Hartford & Eastern, the Wasioto & Black Mountain and the Kentucky Highlands, the per centage in Kentucky is 32 plus, is it not?"

A. "Yes, sir."

"And if you include these roads, the percentage in Kentucky is 35 plus?"

A. "Yes, sir."

The above roads referred to should be included, as is shown in the letter of H. L. Stone, General Counsel, to H. M. Bosworth, Auditor of Public Accounts, which will be found beginning on page 596, printed record. The controlled roads referred to are the roads in which the plaintiff owns stock as is shown by the mileage statement previously mentioned. The plaintiff has absolutely no control over the income of these roads. It cannot direct how the revenues of the roads shall be applied. It is only a stock holder in these roads. We have already shown that if we exclude the controlled roads from consideration and apportion to Kentucky on the basis of 35.15 per cent, we will obtain slightly less than if we include the controlled roads, and also include the value of their capital stock and apportion on the basis of 24.6. The plaintiff insists that the controlled roads must be considered, because the statute so states, but the statute does not define what is meant by a controlled road. We insist that a controlled road is one where the plaintiff is able to direct its affairs, collect its revenues and apply the revenues as it sees proper. If it cannot do this it does not control the road. To be more specific, a controlled road within the meaning of the Statutes of Kentucky, is one where plaintiff owns all the shares of stock and all the bonds which constitute its muniment of title, and the income and revenues of such controlled road accrue to plaintiff. Plaintiff has about 600 miles of such road, as is shown in its report to stockholders, and it is probable that the Legislature had this character of controlled roads in mind when the statute was enacted.

In the case of Commonwealth of Kentucky vs. L. & N. Railroad Company, 149 Ky., 829, the Court of Appeals of Kentucky made some reference to this provision of the statutes relating to controlled roads. That was a proceeding by an Auditor's Agent to have certain property of the plaintiff assessed for the year 1909 as

omitted property. One basis for claiming that it had been omitted was that the Board of Valuation and Assessment had not properly assessed its franchise in that it had taken into consideration the controlled mileage. The court in the opinion said:

"But, there is an attempt to show that in this case the property sought to be assessed as omitted property was not included in the capital stock valuation, because the Board of Valuation and Assessment, in fixing the capital stock, considered other roads controlled by the Louisville & Nashville Railroad Company, through stock ownership, but which were operated by their own organizations. The statute requires that the railroad company shall report to the Auditor of Public Accounts its entire lines 'operated, owned, leased or controlled' in and out of the State. If the railroad company owns a majority of the stock of another company, so that it may elect its directors and dictate its policy, there can be no doubt that it controls it within the meaning of the statute, and that such other railroad should be included in the report required to be made to the Auditor. If required to be reported, the Board of Valuation and Assessment may take them into consideration in fixing the value of the franchise of the controlling company in * * * Kentucky. That being true, the allegations in the second paragraph of the petition are not sufficient to show that the Board of Valuation and Assessment, in fixing the value of appellee's franchise, adopted a plan different from that provided by the statute."

If, under this opinion, the plaintiff is entitled to bring into consideration the mileage of the controlled roads, it is absolutely necessary that the value of the capital stock of such controlled roads be brought in in order that the State of Kentucky may have its proper value. If you bring in the mileage of the roads and do not bring in the capital stock, it necessarily follows that the State of Kentucky will permit values to be exported from the State. To illustrate: Suppose that the plaintiff

in this action should take its surplus of approximately thirty millions of dollars and buy any portion of the capital stock in two thousand miles of railroad wholly outside of the State of Kentucky, the plaintiff would have the same value as it had before and the transaction should add value to plaintiff's property in Kentucky, but instead of adding value to plaintiff's property in Kentucky if we follow the reasoning of plaintiff the value of plaintiff's property in Kentucky will be very materially reduced. The mileage in Kentucky would remain the same while the mileage outside of Kentucky would be largely increased, and the percentage of mileage in Kentucky would be very materially reduced. Apply then the reduced percentage to the total value of the capital stock which has not been changed, and it will be readily seen that values have been exported from the State of Kentucky. It is an awkward construction of the law to say that the value of the capital stock of those controlled roads shall be considered, but it must be brought in to even up the bringing in of the mileage.

It cannot be seriously contended that plaintiff has the right to bring in the mileage of controlled roads which adds nothing to the value of the capital stock and reduce the percentage in Kentucky from 35.15 to 24.6 per cent. If the value of the capital stock of the controlled roads is also included and the percentage of 24.6 is used the result will be approximately the same as excluding the controlled roads and using the percentage of 35.15. The plaintiff contends that the board is limited to the mileage ratio alone in apportioning values to Kentucky, while the board contends that it is not so limited. It is true that the statutes require that the mileage proportion shall be considered, but we insist that it is considered solely as a basis, and that if it does not obtain the correct value of plaintiff's property in the State of Kentucky that the board must consider other matters,

and it is wholly immaterial whether the board makes the change in the amount apportioned to Kentucky by adding to the mileage proportion or by ascertaining the value based upon the mileage proportion and then adding to such value an additional amount ascertained in some other way.

Section 4079 Kentucky Statutes, page XIII., Appendix A, specifically provides as follows:—

"If the corporation, company or association be organized under the laws of any other State or government or organized and incorporated in this State, but operating and conducting its business in other states, as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: The gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made."

Clearly, this additional information must be furnished so that the board may ascertain whether the apportionment made on a mileage basis is correct. After a consideration of this information, as well as any other information which the board may obtain, the board may increase the percentage on which the apportionment is made to Kentucky or it may apportion on a mileage basis, and by using the other information ascertain whether that leaves an excess value outside of the State properly apportionable to Kentucky, and if it does leave an excess value outside of the State the board must ascertain the amount of that excess value and add it to the sum obtained when apportionment was made on the mileage basis. In this case the board may have used the mileage basis as contended for by plaintiff, and if after having made an apportionment on that basis and having found that

the apportionment did not correctly represent the values in this State by reason of the plaintiff's having included controlled lines of road or by reason of the fact that the net income proportion and the gross income proportion were much larger than the mileage proportion, the board had the right to increase the percentage on which values were apportioned to Kentucky until it would bring into Kentucky the total value of plaintiff's property in Kentucky. If the board desired to use the mileage proportion as contended for by plaintiff, it could have done so and then ascertained the excess value and added such excess value to the amount apportioned to Kentucky on the mileage basis, and in that way obtained the same result that was obtained by the board in using the percentage of 35.15. To illustrate again: Suppose the plaintiff should dispose of all of its stocks in other railroads and have cash in its treasury representing the amount realized from the sale of said stock. In that instance there would be no change in the value of the capital stock of plaintiff, and admittedly the proper ratio of apportionment to the State of Kentucky would be 35.15. This ought to show that the same result is obtained by considering only the operated mileage of plaintiff and apportioning on the basis of 35.15 as would be obtained by considering the controlled mileage and using the percentage 24.6 and after the apportionment making such additional adjustment as might be necessary to obtain the correct value of plaintiff's property in the State of Kentucky.

The District Judge in his opinion holds against the contention of the plaintiff, and in doing so used this language:

"But, if $262,252,566 was the fair cash value of what the board took to be plaintiff's unit, the fair cash value of its unit was more than this sum. Plaintiff's unit consisted of more than what the board took it to be. It consisted, in addition thereto, of so much of the controlled

mileage as was not represented by the stock and bonds owned by plaintiff. Adding the value thereof to the sum of $262,252,566, and then taking 24.9601 per cent. of the total, deducting therefrom the value of the controlled mileage in Kentucky, taking 60 per cent. of the remainder, and deducting the assesed value of the tangible property, would, as I view it, give the value of the franchise according to the statute. I am unable to make out its value in this way, because there is nothing in the record to show the value of the portion of plaintiff's unit not considered by the board, or the value of that portion of its controlled mileage which was in Kentucky. It is possible that the result of a consideration of these two matters, in the way indicated, would make the value of the portion of plaintiff's unit in Kentucky as much as $92,181,766, the sum at which the board fixed it, by apportioning to Kentucky a part of the value of $262,252,566 on the operated on its own account mileage basis. I doubt, however, whether it would.

"The condition of things, then, is this: The board has found the fair cash value of the portion of plaintiff's unit in this State to be $92,181,766, without any excess value. They have not gone at it in the right way. But they have in fact found such to be its value. It is possible that, if they had gone at it in the right way, they would have found such to be the value thereof." (Page 150 printed record.)

It may be that the board did not have absolutely correct information as to the value of the capital stock of the controlled roads, and it may be that the board did not have correct information as to the gross and net income properly apportionable to Kentucky, but it was not the fault of the board that it did not have this information. In fact, plaintiff was specifically called upon to give this information and declined upon the idea that it did not possess the information. The board was then left to the alternative of either not considering the things which it was necessary for it to consider in order to correctly ascertain the value of plaintiff's property in the

State of Kentucky, or of obtaining a value in the way in which it did. The board then, exercising the right given to it under the statute, obtained information from sources that it considered reliable and considered all the things which the District Judge refers to, and after having considered these things it found the value of plaintiff's property in Kentucky to be $94,500,000, but reduced the amount to $75,159,402.

We insist that it is wholly immaterial how the result was obtained by the board if the result is substantially correct. In the event the board did not place a greater value upon plaintiff's property in the State of Kentucky than its actual value estimated at the price it would bring at a fair voluntary sale, then the plaintiff cannot complain. Although the board may have followed a wrong method, if it obtained a right result it cannot be said that the judgment of the board should be set aside.

The facts in this case are very similar to the facts in the case of Chicago, Burlington & Quincy Railroad Company vs. Babcock, 204 U. S., 585. It was there alleged that the board in making an assessment of property acted fraudulently and arbitrarily. It was also there alleged that the board acted as a result of political exigencies which made it necessary for the State to raise money. In passing on the question in issue in that case, the court said:

"The dominant purport of the bills is to charge political duress, so to speak, and a consequent scheme of fraud, illustrated by the specific wrongs alleged, and in that way to make out that the taxes were void. As the cases come from the circuit court, other questions beside that under the Constitution are open, and, therefore, it is proper to state at the outset that the foundation for the bills has failed. The suggesion of political duress is adhered to in one of the printed briefs, but is disposed of by the finding of the trial judge, which there is no sufficient reason to disturb. The charge of fraud, even if

adequately alleged (Missouri vs. Dockery, 191 U. S., 165, 170, 48 L. Ed., 133, 134, 24 Sup. Ct. Rep., 53), was very slightly pressed at the argument, and totally fails on the facts. *Such charges are easily made and, it is to be feared, often are made without appreciation of the responsibility incurred in making them.* Before the decree could be reversed it would be necessary to consider seriously whether the constitutional question on which the appeals are based was not so pleaded as part of the alleged fraudulent scheme that it ought not to be considered unless that scheme was made out. Eyre vs. Potter, 15 How., 42, 56, 14 L. Ed., 592, 598; French vs. Shoemaker, 14 Wall., 314, 335, 20 L. Ed., 852, 857; Hickson vs. Lombard, L. R. 1 H. L., 324."

Further along in the same opinion, in discussing the method pursued by the board in arriving at the amount at which the property of the railroad was assessed, the court said:

"*Exactly what weighed in each mind, and even what elements they purported to consider in their debates, is little more than a guess. There is testimony which cannot be neglected that, in this very matter of valuing the road by stock and bonds, etc., the board, from another table furnished by the company, valued it at over* $540,000,000, *and did deduct from that sum the stocks and bonds owned by the road,* and valued by the board at over $140,000,000, prior to the subsequent reduction to $55,000 a mile. It is said that this valuation is absurd and due to misunderstanding of the table. *But we have nothing to do with complaints of that nature, or with anything less than fraud, or a clear adoption of a fundamentally wrong principle.*"

It has been insisted in this case while pending before the District Judge, that the board was unable to explain the process whereby it reached its conclusions. In a measure that may be true, as the learned District Judge had great difficulty in reaching conclusions touching the questions involved, and, in fact, has not finally disposed

of some of the questions even unto this day, and it is not to be wondered at that a board, the members of which are laymen, was unable to explain in detail just why it did the things which were done by the board. A further quotation from the Babcock case is applicable as touching this particular point, where the court said:

"Evidently the board believed that the figures furnished by the roads were too favorable and were intended to keep the taxes as low as they could be kept. Evidently, also, the members or some of them used their own judgment and their own knowledge, of which they could give no very good account on cross-examination, but *which they had a right to use, if honest, however inarticulate the premises.* It would seem from the testimony, as might have been expected, that the valuations fixed were a compromise and were believed by some members to be too low, as they seemed to one too high. It is argued to us, on expert testimony, that they are too low. The result of the evidence manifests the fruitlessness of inquiries, which, as we have said, should not have been gone into at all. We have averted more particularly to the case of the Union Pacific, but that of the Chicago, Burlington & Quincy Railroad stands on similar and no stronger ground, and what we have said disposes of the main contention of both. If the court below had found the other way it would have been difficult to say that the finding was sustained by competent evidence. There certainly is no sufficient reason for disturbing the finding as it stands."

It has been insisted that the large increase made in the franchise values of the various railroads in the State of Kentucky since 1912 conduces to show that the assessments so made have been as the result of arbitrary action on the part of the board making the assessments. This suggestion, as well as the suggestion that the assessment now in controversy is illegal and excessive because of the large increase, is well met by the court in

the case of Pittsburgh C. C. & St. L. R. Company vs. Backus, 154 U. S., 421, where the court said:—

"Our conclusion, therefore, is, that this act is not obnoxious to any of the constitutional objections made to it. There remains the further question whether, in the actual administration thereof in this case, there has been any illegal assessment of the property of the plaintiff. It is charged that the valuation was increased from $8,538,053 in 1890 to $22,666,470 in 1891, and it is not to be denied that such a great increase suggests that which is unfortunately too common—an effort to cast an unreasonable proportion of the public burdens upon corporate property. It is stated by counsel for plaintiff in their brief that the increase from 1890 to 1891 *in the valuation of all other than railroad property in the several counties through which its road extends was only forty-three per cent., while, as appears, that of the property of the plaintiff was more than 150 per cent. Still, it must be borne in mind that a mere increase in the assessment does not prove that the last assessment is wrong.* Something more is necessary before it can be adjudged that the assessment is illegal and excessive, and the question which is to be now considered is whether the testimony shows that the assessment made by the State Board can be adjudged illegal."

The State has insisted all along in this case that the true cash value of plaintiff's property in the State of Kentucky for the year ending June 30, 1912, was a question of fact, the determination of which for the purpose of taxation was given to the State Board of Valuation and Assessment, and that when the board acted honestly and in good faith, that its findings cannot be attacked except upon the grounds of fraud or the following of a fundamentally wrong principle equivalent to fraud. This position of the State is well supported by another quotation from the Backus case, as follows:—

"Upon this testimony the decision of the court was that there was nothing to impeach the assessment made by the State Board, and in this conclusion we concur. The true cash value of the plaintiff's property in the State of Indiana, in the year 1891 was a question of fact, the determination of which for the purposes of taxation was given to this special tribunal, the State Board. *Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.* Here the question determined by the State Board was the value of certain property. That determination cannot be overthrown by the testimony of two or three witnesses that the valuation was other than that fixed by the board. It is true such testimony may be competent, and was received in this case because, taken in conjunction with other testimony, it might establish fraudulent conduct on the part of the board sufficient to vitiate its determination. It is not, however, contended by counsel that there was any actual fraud on the part of that board; that the individual members thereof deliberately violated the obligations of their oaths of office, and intentionally placed upon the property of the plaintiff a valuation which they knew to be grossly in excess of that which it in fact bore, and did so with the purpose of making the plaintiff bear a larger share of the burden of the support of the State government than it rightfully should. The contention is rather that the board made a grevious mistake in placing so high a value, and that it took into consideration property within a value partly deduced from that without the State. The testimony, however, does not sustain this contention."

The State insists that the board strictly pursued the statute under which it was required to act, and that it made use of the information which the statute required it to consider, and that in addition that it used such information as it was able to obtain bearing upon the subject, and that it exercised its own judgment as to

the true value of plaintiff's property in the State of Kentucky. That it was justified in doing this is well shown in State Railroad Tax Cases, 92 U. S., 575, where the court said:—

"As we do not know on what evidence the board acted in regard to these railroads, or whether they did not *act on knowledge which they possessed themselves*, and as all valuation of property is more or less matter of opinion, we see no reason why the opinion of this court, or of the circuit court, should be better or should be substituted for that of the board, whose opinion the law has declared to be one to govern in the matter."

The state insists that this suit has not been brought within any of the recognized foundations of equitable jurisdiction. No relief can be granted by a court of equity in restraining the collection of a tax, although the same may be illegal unless there is something in the assessment which will bring the relief sought within some of the well recognized rules of equity. In the Railroad Tax cases, *supra*, the court laid down this rule in the following language:

"We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say that, in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that *mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law*, either before or after payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the

manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the Constitution of all the States, and by the theory of our English orgin, is exclusively legislative. Heine vs. Levee Commissioners, 19 Wall., 660 (86 U. S., XXII, 226.)"

Further in the same opinion the court states another principle which is applicable to the case at bar.

"*If there is an excessive estimate of the value of the franchise or capital stock, or both, it is by an error of judgment in the officers to whose judgment the law confided that matter; and it does not lie with the court to substitute its own judgment for that of the tribunal expressly created for that purpose.*"

In the case of Missouri vs. Dockery, 191 U. S., 165, in discussing the charge of fraud made in the bill of complaint the court said:

"But if this consideration be laid on one side, it is impossible to say that the Board of Equalization has not acted with regard to those companies which it has assessed. It has laid a substantial tax upon them. Its judgment is final under the Missouri Constitution and Statutes. Mo. Const., Art. 10, Sec. 18; Rev. Stat., Secs. 9344, 9356, Stat. 1901, p. 232. If, nevertheless, we assume that mandamus would lie upon a clear case of fraud adequately alleged and proved (State Board of Equalization vs. People, 191 Ill., 528, 539, 58 L. R. A., 513, 61 N. E., 339), *it would be a strong thing to revise the judgment of the board on the strength of allegations of under valuations, and the single adjective 'fraudulent' without more specific allegations of fact.* State, ex rel. Gottlieb vs. Western Union Telegraph Co., 165 Mo., 502, 516, 517, 65 S. W., 775; State ex rel. Folk vs. Talty, 166 Mo., 529, 560, 66 S. W., 361; Manchester vs. Furnald, 71 N. H., 153, 158, 51 Atl., 657; Knight vs. Thomas, 93 Me., 494, 45 Atl., 499; Maish vs. Arizona, 164 U. S., 599, 611, 41 L. Ed., 567, 571,

17 Sup. Ct. Rep., 193; Pittsburg, C. C. & St. L. R. Co. vs. Backus, 154 U. S., 421, 434, 438, 38 L. Ed., 1031, 14 Sup. Ct. Rep., 1114. See Fogg vs. Blair, 139 U. S., 118, 127, 35 L. Ed., 104, 107, 11 Sup. Ct. Rep., 476."

As showing things that are not sufficient to justify the court to interpose and set aside the judgment of a taxing board we beg to call the attention of the court to the language used in the case of Western Union Telegraph Company vs. Attorney General, 125 U. S. 546:

"It was further argued in that case that the tax was excessive and invalid because, in ascertaining the whole valuation of the stock, no deduction was made on account of the value of real estate and machinery, situated and subject to local taxation, outside of the State of Massachusetts; although it appeared that the company owned lands and buildings outside of the State, the cost of which was more than $3,000,000 and upon which it had been assessed and had paid taxes of more than $48,000, 125 U. S., 542, 544, 552 (31: 790, 792, 794.)

"The court, notwithstanding, declared that it did not feel called upon to *defend all the items and rules by which the authorities of the State arrived at the taxable value on which its ratio of percentage of taxation should be assessed, or to hold the tax void because the court might have adopted a different system had it been called upon to accomplish the same result; and decided that the rule adopted to ascertain the amount of the value of the capital engaged in business within the boundaries of the State, on which the tax should be assessed, was not an unfair or an unjust one, and that the details of the method by which this was determined did not exceed the fair range of legislative discretion.*"

And further as touching the same matter, we beg to refer to the language of the court in case of Western Union Telegraph Company vs. Taggart, 163 U. S., 1, as follows:

"The bill then alleges that the commissioners took, as a basis of their assessment, the value of the plaintiff's entire capital stock, estimating the value of the shares according to the price of such shares in the stock exchange market in New York City, and dividing such aggregate value by the total number of miles of the plaintiff's telegraph lines, wherever situated, and thereby obtaining a pretended valuation of $357 per mile of its telegraph line in Indiana, which was 'grossly excessive and far beyond the true cash value of complainant's property in Indiana.' But the bill immediately proceeds to allege that 'said State Board of Tax Commissioners, in reaching said valuation of complainant's said property in Indiana, did not consider and assess the value of the property of complainant situated in Indiana, otherwise than by pursuing the requirements of said pretended statute.' And the facts stated elsewhere in the bill demonstrate that the commissioners did not obtain their valuation by merely applying the rule stated in this paragraph. Had they done so, the result would have been that the whole number of shares of stock, being 948,200, at $94.50 a share, would have been $89,594,900, which, divided by 189,576, the whole number of miles of all the plaintiff's lines, would give a value per mile of upwards of $472, or nearly one-third more than the valuation adopted."

As showing that the judgment of an assessing board cannot be overthrown by evidence going only to show that the fact was otherwise than as found by said board, we call attention to the case of Adams Express Company vs. Ohio, 165 U. S., 194, where the court said:

"We have said nothing in relation to the contention that these valuations were excessive. The method of appraisement prescribed by the law was pursued and there were no specific charges of fraud. The general rule is well settled that 'whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into

inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.' Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S., 434 (38: 1039); Western Union Telegraph Co. vs. Taggart, 163 U. S., 1 (41: 49.)"

As showing that the judgment of a taxing board cannot be set aside without showing something more than an error of judgment, we cite the case of Maish vs. Arizona, 164 U. S., 599, where the court said:

"No assessment could be sustained if it depended upon the fact that all parties thought the valuation placed by the assessing board was correct. Something more than an error of judgment must be shown; something indicating fraud or misconduct. Neither is the fact that an officer of the railroad company came before the board and declared its willingness to pay taxes on a certain valuation and its intention to resist the payment of taxes on any higher valuation sufficient to impute fraudulent conduct to the board, although it finally fixed the valuation at the sum named by the railroad company. It appears from the testimony of one of the members of the Equalization Board that it was guided largely by the valuation placed in other States and territories upon railroad property, and that from such valuation, as well as from that given by the railroad company, it made the assessment at something like the average of the valuation of railroads in the various States and territories named. It is unnecessary to determine whether this board erred in its judgment as to the value of this property, whether it would not have been better to have made further examination and taken testimony as to the cost of construction, present condition, etc. *Matters of that kind are left largely to the discretion and judgment of the assessing and equalizing board, and if it has acted in good faith its judgment cannot be overthrown.* Pittsburg, C., C. & St. L. R. Co. v. Backus, 154 U. S., 421, 435 (38: 1031, 1039.)"

In the case of Brooklyn City Railroad Company vs. New York, 199 U. S., 48, the court laid down this rule:

"Another section provides for a review of the assessment by writ of certiorari. These provisions were all complied with. Notice was given to the relator, and on the day fixed for the hearing it appeared and filed its objections. Thereafter it took out a writ of certiorari to review the proceedings of the tax board. Surely by this due process of law was secured. It will not do to say that the valuation of a piece of property is mere guesswork. True, it is often largely a matter of opinion, and mathematical exactness is not always possible. Various elements enter into and affect an opinion respecting the value of a given piece of property, and all that can be required is that the assessing board exercise an honest judgment, based upon the information it possesses or is able to acquire. That valuation is of the property as a totality, and it is unnecessary in making an assessment to disintegrate the various elements which enter into it, and ascribe to each its separate fraction of value. Oftentimes the combination itself is no inconsiderable factor in creating the value. We are of the opinion that the relator was not denied due process of law in the valuation and assessment of its franchise."

The case of Kelley vs. Pittsburg, 104 U. S., 80, is another case where the court held that a judicial tribunal cannot review and correct errors and mistakes of State tribunals in the assessment of property. The court there said:

"It is alleged, and probably with truth, that the estimate of the value of this land for taxation is very greatly in excess of its true value. Whether this be true or not we cannot here inquire. *We have so often decided that we cannot review and correct, in this court, the errors and mistakes of the State tribunals on that subject, that we can only refer to those decisions without a restatement of the argument.* State R. R. Tax Cases, 92 U. S., 575 (XXIII., 663); Kennard v. Morgan,

92 U. S., 481 (XXIII., 479); Bank v. Kimball (ante, 469); Davidson vs. New Orleans (*supra*); Kirtland vs. Hotchkiss, 100 U. S., 491 (XXV., 558); Missouri v. Lewis, 101 U. S., 22 (XXV., 989.)"

To the same effect is the rule laid down in the case of San Diego Land & Town Company vs. National City, 174 U. S., 732, where the court said:

"What the Supreme Court of California said in Spring Valley Water Works vs. San Francisco, 82 Cal., 286, 306, 307, 309, 315 (6 L. R. A., 756), upon this subject would seem to be a sufficient answer to the views expressed by the appellant. In that case it was contended that a board of supervisors had fixed rates arbitrarily, without investigating, without any exercise of judgment or discretion, without any reference to what they should be, and without reference either to the expense incurred in furnishing water or to what was fair compensation therefor. The court said: 'The Constitution does not contemplate any such mode of fixing rates. It is not a matter of guesswork or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the Constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation it is the duty and within the jurisdiction of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. *But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed.* There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing.'"

As supporting the view that courts will not sit to review the judgment of taxing officials, we also desire

to cite Rogers vs. Hennepin, 240 U. S., 184; Orient Insurance Company vs. Board of Assessors, 221 U. S., 358. In the case of State S. W. Ry. vs. Arkansas, 235 U. S., 350, where the court said:

"Nothing in the Fourteenth Amendment imposes any iron-clad rule upon the states with respect to their internal taxation or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions. Davidson vs. New Orleans, 96 U. S., 97, 105, 106; Bell's Gap R. R. vs. Pennsylvania, 134 U. S., 232, 237; Pacific Express Company vs. Seibert, 142 U. S., 339, 351; Adams Express Company vs. Ohio, 165 U. S., 194, 228; Merchants Bank vs. Pennsylvania, 167 U. S., 461, 464; Magoun vs. Illinois Trust & Savings Bank, 170 U. S., 283, 295; Armour Packing Co. vs. Lacy, 200 U. S. 226, 235; Michigan Central R. R. vs. Powers, 201 U. S., 245, 293."

In the case of Dalton Machine Co. vs. Virginia, 236 U. S., 700, the court said:

"The general principle is that it is not for the courts to stop officers of this kind from performing their statutory duty for fear that they should perform it wrongly. First Nat. Bank of Albuquerque vs. Albright, 208 U. S., 548, 553. Especially is this true in the manner of collecting taxes and license fees. Boise Artesian Hot & Cold Water Co. vs. Boise City, 213 U. S., 276. The appellant has an adequate remedy at law in its right to raise the constitutional question if proceedings are taken against it, or, it seems, to recover the money if it pays under protest. No special circumstances are shown, that we can notice. to take this case out of the ordinary rule. Indiana Mfg. Co. vs. Koehne, 188 U. S., 681, 690."

The Court of Appeals of Kentucky has also followed the same general rule as the Supreme Court of the United States in holding that a court cannot review

and correct the errors and mistakes of taxing officers whose duty it is to assess property for taxation.

In the case of Commonwealth vs. Covington & Cincinnati Bridge Company, 114 Ky., 343, the court said:

"It is also insisted for appellee that the basis adopted by the board in this case, or the mode by which it reached its results, was erroneous. If this be conceded, still, if the result reached by the board was correct, or not more onerous on appellee than it should have been, the assessment cannot be disturbed; for no principle is better settled than that, if an officer is right in his conclusion, the fact that he gives bad reasons for it, or reached it in the wrong way, is immaterial."

The reason for the rule above announced by the Kentucky Court of Appeals is easily understood. Ultimate power to decide all questions of fact that may arise must be lodged in some tribunal, and that tribunal must have the right to render a final decision. In assessing franchises, or other property for that matter, the action of a board is final in so far as the board had the power to act. Where the board is acting under a constitutional statute and remains within the provisions of such statute the acts of the board are final and conclusive. If the board acts contrary to the provisions of the statute or if it does that which the statute does not authorize it to do, and as a result of such unauthorized acts the property of any tax payer is assessed at more than it is required to be assessed under the laws of the State, the act of the Board is not final.

In the case of Southern Pacific R. R. Company vs. Commonwealth, 134 Ky., 410, the court said:

"There is an entire failure to show fraud or mistake. The proof simply shows that the Board, being in great doubt how to assess the franchise or how to determine its value, finally lumped it at $1,000,000.00. This was an exercise of judgment on their part. The statute confided to them the valuing of the property. The taxes

were paid upon the valuation. Their action was not void. They discharged the duty devolved upon them by the statute as best they could, and, if they erred in judgment, that is no reason why the court should award a mandamus against them requiring them to meet again and make an assessment of the franchise. If a mandamus were awarded, the present board would only be able to make another lump assessment on the same report."

In the case of Henderson Bridge Company vs. Commonwealth 99 Ky., 623, which was probably the first case involving the construction of the statutes of Kentucky now under consideration, the Court of Appeals said:

"It should be further said that the findings of this Board of Valuation and Assessment partake of a judicial nature. The defendant had its day in court. It did appear on notice before that board and on evidence made its defense. And on this hearing, that board rendered its decision in fixing the value of the franchise of defendant, granted by authority of the State of Kentucky, and this finding, if not conclusive, is entitled to a very high degree of consideration and authority, and it should not be lightly set aside or disregarded by the courts, unless the board proceeded upon an erroneous principle or adopted an improper mode or manner of estimating the value of the franchise or unless fraud is charged and shown to exist."

In case of Coulter, Auditor, vs. Louisville Bridge Company 114 Ky., 43, the Court of Appeals said:

"We are of opinion and hold that when the proper assessing officers, within the time and substantially in the manner prescribed by statute, have acted in considering and fixing the valuation upon property liable to assessment for taxation, and no relief has been obtained within the time allowed by statute for correcting their action, if erroneous, that action is final. The judgment and action of the assessor based upon the legal

evidence then obtainable and at hand, and as fixed by statute, when recorded in the proper tax lists, in the very nature of things, should be conclusive upon the State, as well as against the tax payer."

In the case of City of Covington vs. Shinkle, 25 Ky. Law Rep., 73, in discussing the effect that should be given to the action of the City Board of Equalization the court said:

"The statute does not provide for an appeal from their valuation to the courts, and courts of equity will not enjoin the collection of a tax upon the ground that the property has been assessed too high, unless it be shown that the assessment is so excessive as to import fraud in the assessor, or amount to spoliation."

There is one contention which is made by plaintiff and which was decided adversely to the plaintiff by the District Judge, to which we desire to refer. Plaintiff has insisted that in the ascertainment of its franchise value in the State of Kentucky the State Board of Valuation and Assessment should have found the total value of plaintiff's capital stock, and from such total value should have deducted the value of the tangible property, wherever situated, and that the remainder only should have been used as the amount, a part of which should be apportioned to Kentucky on the mileage basis. We do not think there is the slightest authority in the law for this contention. The Court of Appeals has passed upon this question a number of times, and the views of the court expressed in the several decisions are harmonious.

We will not undertake to review at length the cases in which this question has been passed upon, but will refer briefly to some of the cases where the question was raised. In the case of Commonwealth, By, etc. vs. Cumberland Telephone & Telegraph Company, 30 Ky. Law

Reporter, 724, the court passed specifically on this question, and in doing so used this language:

"When the entire capital stock of a corporation is valued, this represents all of its property of every kind, for every part of the property of the company goes to make up the value of its capital stock. The only deduction from this sum total, authorized to be made by the statute, is the assessed value of all the tangible property assessed in the State, or in the counties where situated; and that the Board may know what deduction to make, the corporation is required to report the amount and kind of tangible property it owns in the State, where situated, assessed or liable to assessment. As the Board of Valuation is not authorized to deduct from its assessment anything but the tangible property assessed, or liable to assessment in this State, it necessarily follows that all other property except this is included in its assessment."

In the case of Commonwealth vs. L. & N. Railroad, 142 Ky., 663, the court again specifically passed on this question, and used this language:

"But in as much as the Board of Valuation and Assessment, in arriving at the value of the franchise, must deduct from the total value fixed by it upon the capital stock of the company, the assessed value of its tangible property, as found by the Railroad Commission, it is readily seen that the assessment is at last made by the Board of Valuation and Assessment."

This decision was rendered in a case to which the plaintiff in this action was a party, and the court clearly shows that the correct method is to apportion to the State of Kentucky and then deduct the tangible property as assessed by the Kentucky Railroad Commission, and as shown by the court the property of a railroad company is at last assessed by the Board of Valuation and Assessment, because the assessment of the tangible

property by the Railroad Commission is deducted from the assessment of the entire property made by the State Board of Valuation and Assessment. As long as the value of the tangible property is not equal to or greater than the total value of all the property as found by the Board of Valuation and Assessment, the assessment of tangible property made by the Railroad Commission is wholly immaterial. If it is made large the remainder left after deducting such assessment from the total value may be small, but if the tangible assessment is made small the deduction from the total value as fixed by the State Board of Valuation and Assessment may be large. As showing that the Kentucky Court of Appeals is thoroughly committed to the doctrine that only the assessed value of tangible property assessed in this State can be deducted from the value of the capital stock of railroad and similar corporations in this State, we quote from the recent case of Commonwealth vs. United States Express Company, 149 Ky., 755. In that case the court said:

"The statute also provides that when the value of the capital stock of the corporation is fixed there shall be deducted from it the assessed value of all tangible property assessed in this State, and that the remainder shall be the value of the corporate franchise, subject to taxation. This provision of the statute applies to foreign as well as domestic carriers, and when the State undertakes to find the value of the franchise of a carrier, there must be deducted from the value of its capital stock as ascertained in the manner pointed out in the statute the assessed value of its tangible property in this State, the remainder being the value of the franchise."

Probably the doctrine is no more clearly expressed in any recent case than it is in the old case of Commonwealth vs. Covington & Cincinnati Bridge Company, 114 Ky., 343, where the court said:

"Where 59 per cent. of the length of an interstate bridge was in the limits of Kentucky, the valuation of the bridge company's franchise for taxation should be found by taking 59 per cent. of the total value of the stock and bonded indebtedness, and deducting from this amount the assessed valuation of the tangible property of the bridge company in Kentucky."

The Court of Appeals of Kentucky in the case of City of Newport vs. South Covington, Cincinnati Street Railway Company, 156 Ky., 403, again reiterates the principle which has been often announced, and that is, that the assessed value of the tangible property in the State must be deducted from the value of the total property. It is again stated in that case, that:

"A franchise tax is not a license or occupation tax, but simply an ad valorem or property tax; and to impose a tax on the capital stock of the corporation, and also upon the property in which its capital stock is invested would be double taxation and illegal."

The court also suggests the method of ascertaining the capital stock and what is included in the value of that which is called "capital stock." The court on this point said:

"Briefly stated, the corporation must, among other things, report to the State Auditor the facts upon which the valuation of its franchise is based. From these reports, the State Board capitalizes the total earning power of the corporation, say on a 6 per cent. basis, and this capitalization, called the 'capital stock' of the corporation, being arrived at, there must be deducted from it the assessed value of all tangible property of the corporation, and the remainder thus ascertained constitutes the value of its franchise subject to taxation. The entire capitalization must, and does, include all the property of the corporation, be it bonds, stock, real estate, notes, accounts, rails, power house, cars, or any other

property, tangible and intangible, and if the tangible property upon which the corporation pays taxes were not deducted from the total capitalization, there would be double taxation."

In the case just cited the Court of Appeals refers to the case of Southern Railway Company vs. Coulter, Auditor, 113 Ky., 657, and explains what was held in that case. In explanation of the language used in the last mentioned case the court says:

"And yet another question, that though Section 4081, Kentucky Statutes, provides that when the lines of a railroad corporation extend beyond the limits of the State, the franchise of such corporation 'shall be liable to taxation in each county, incorporated city, town or district through or into which said lines pass, or are operated, in the same proportion that the length of the lines in such county, city or district bears to the whole length of line in the State, less the value of any tangible property assessed or liable to assessment, in any such county, city, town or taxing district,' the value of the entire tangible property having been deducted in arriving at the value of the franchise for the entire State, the value of the tangible property in each county and city is not to be again deducted in arriving at the local taxation."

In view of these decisions of the Court of Appeals in construing a statute of Kentucky, we do not believe that the contention will be seriously pressed that only intangible values are to be apportioned to Kentucky. What is called the franchise of a railroad company in Kentucky includes not only intangible values but may include tangible values as well. It includes all values not included in the valuation of tangible property made by the Railroad Commission and if the Railroad Commission did not assess the tangible values at their full value, the remainder of such tangible values is included

in the assessment made by the State Board of Valuation and Assessment. The Court of Appeals of Kentucky has so held, and it is the only reasonable construction that can be placed upon the statutes.

The assessing authorities in the State of Kentucky have a right to determine the value of property in Kentucky for purposes of taxation, and it would be depriving the assessing authorities of the State of Kentucky of their right to assess property for taxation if they were compelled to accept an assessment of tangible property made by the taxing authorities of some other State and deduct such assessment from the total value of the capital stock as found by the Kentucky authorities. The Kentucky authorities do not have the power to investigate the value of tangible property of an interstate railroad in other States, and they certainly cannot be compelled to accept the valuation placed upon the tangible property of such carriers in other States by the assessing officers of such other States.

JUDGMENT OF THE STATE BOARD OF VALUATION AND ASSESSMENT FINAL UNDER THE FACTS.

From the foregoing authorities we may deduce these rules:

1. Courts do not resolve themselves into assessing boards for the purpose of determining the value of property for taxation.

2. That boards in whom is vested the power to make assessments are the sole judges of the facts, and if an assessing board exercises an honest judgment based upon such facts, its action is conclusive.

3. If an assessing board or officer acts under a constitutional statute and substantially in accordance with the provisions of such statute, its actions are final and a court will not set aside the judgment of such board.

4. That the action of an assessing board cannot be attacked in a court of equity except upon the grounds of fraud or that the board pursued a method in making the assessment which is not justified by the statutes under which the Board acts.

5. If boards having the power to make an assessment act under an unconstitutional statute, or act without authority found in the statute, the acts of the board are subject to review by courts of equity.

6. That if the assessing authorities of a State do not place a valuation upon property greater than the actual value provided by law for the assessment of property, the action of the authorities will not be set aside by the courts, although such assessing authorities follow a wrong method in making the assessment.

With these suggestions of principles which we believe are correct, we beg to state that this case presents but one great question, and the other questions are subordinate to the one question. The Constitution and laws of Kentucky unquestionably require that all property shall be assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale. Then the only great question involved in this case is whether the property of plaintiff in Kentucky is worth as much as $75,159,402, estimated at the price it would bring at a fair voluntary sale. If this value is not greater than the actual value of the property measured by the standard aforesaid, plaintiff certainly has no grounds of complaint. On the other hand, if the board placed a valuation upon the property of plaintiff in this State that is above its actual value for taxation as measured by constitutional standards, then plaintiff would have just grounds to complain, provided the Board acted fraudulently or followed a fundamentally wrong principle. The mere over-valuation of property for taxation which over-valuation is brought about through mistakes and

errors of judgment on the part of the Board in calculations and in consideration of questions which are not fundamental, will not justify a court in setting aside an assessment, but if the board pursued a fundamentally wrong method, or was actuated by fraud, and as a result of the following of such fundamentally wrong method, or as a result of fraud, the assessment is placed at a sum above the actual value measured by constitutional standards, then courts of equity may interfere.

The charge of fraud is not proven and there has been no effort to prove that the Board was actuated by fraudulent motives, and while we think that the question which has been raised following the allegation that the board followed an erroneous method has failed because there is nothing to show that the Board did follow an erroneous method, and because the facts in the case fully justify the assessment of plaintiff's property in the manner and under the method that it was assessed, we desire to again state that the important question, and the controlling question, in this case is whether the value of plaintiff's property was equal to the value the Board found. We cannot afford to be led away from this one great question, and we cannot, in justice to the State, afford to confuse the principal question with other questions which are subordinate to it and serve no purpose other than as evidence to determine the main question.

The method followed by the Board is immaterial and wholly so unless that method resulted in showing a greater value of complainant's property in Kentucky than its actual cash value estimated at the price it would bring at a fair voluntary sale. If it should be a fact that the assessment was purely arbitrary, such arbitrary action is immaterial unless it resulted in placing a value on plaintiff's property in Kentucky at a greater sum than its actual cash value estimated at the price

it would bring at a fair voluntary sale. Even if it should be admitted that the Board acted fraudulently, or if it should be admitted that the Board acted under the suggestions and influence of others, as was contended in the District Court, these things are not material and are only to be considered as evidence by the court in answering the one great question, that is: Is the property of plaintiff in Kentucky worth as much as the State Board of Valuation and Assessment found it to be worth?

It is elementary that errors, if any, must have been prejudicial to the rights of the party complaining, else he has no grounds of complaint. If a court follows a wrong reasoning but reaches a correct conclusion, a higher court will not reverse the judgment of the lower court because of the wrong reasoning. The same must be true as to boards having the power to pass upon questions of fact and having the power to determine the value of property. We desire to set down the figures $75,159,402, and say to the plaintiff that its property in Kentucky is worth that sum in cash, and that we base this valuation upon what its property would bring at a fair voluntary sale, and upon this ground we are willing to stand. We also take the position, which we believe to be sound, that when the State Board of Valuation and Assessment fixed the valuation of plaintiff's property for taxation in Kentucky, that the plaintiff must show by competent evidence that the Board has placed a valuation upon its property greater than the fair cash value of the property. The burden is on the plaintiff to show this fact, or, rather, the burden is on the plaintiff to show that the value of the property is not worth as much as it was found to be worth by the board; but this will not be sufficient. The plaintiff must go further and show that the excessive assessment was brought about through fraud on the part of the members of the Board, or through the Board's following a plan or

method not authorized by the laws of the State of Kentucky.

We concede that it is right and proper for the court to know what evidence actuated the Board, and that the court should know the method followed by the Board, but these things are only to be considered by a court as evidence tending to show the value of complainant's property in Kentucky. If, after having considered all the facts which were before the board, the court finds that the Board did not fix an excessive value upon plaintiff's property, the case is ended as no injury was done or can be done to plaintiff under an assessment which does not require it to pay more taxes than it would be required to pay under an assessment which followed strictly the letter of the law; but, after a consideration of the evidence, if the court should come to the conclusion that the assessment is too high, it is then necessary for the court to determine from the facts submitted whether the Board followed a fundamentally wrong principle, or whether it was actuated by fraudulent motives.

We believe that the position we have taken is thoroughly bulwarked by the numerous opinions cited herein. The Statutes of Kentucky in a way point out methods that should be followed in the assessment of property by the State Board of Valuation and Assessment, and we have attempted to show, and an examination of this record will show, that these methods were followed by the Board as nearly as it is possible for human intelligence and human understanding to follow them.

The plaintiff has no right to complain at the assessment which was made, as the only party which has been injured as the result of the assessment is the State of Kentucky. The amount at which this assessment was fixed is not the fair cash value of the property estimated

at the price it would bring at a fair voluntary sale. We are not dealing now with the question of equalization—that will come later—but if property is to be assessed in accordance with the provisions of the Constitution and the laws of Kentucky, plaintiff's property should have been assessed very much higher than it was assessed by this Board.

In concl ..g this branch of the case we cannot refrain from calling the attention of the court to the closing language of the District Judge in his opinion, found on page 150 of the record. He there said:

"And the consideration to which I referred to in the other case (209 Fed., 463), to-wit: That the plaintiff on June 30, 1905, in a suit in this court, claimed that the portion of its railroad in this State, then consisting of 1,265.23 miles, was worth the sum of $70,599,484.81, renders it not unlikely—it would seem, most likely—that the fair cash value of the 1,644.58 miles of plaintiff's railroad in Kentucky, outside of the mileage operated by it on account of the owner and by separate corporations in Kentucky for the year ending June 30, 1912, was as much as that sum."

The court here says that if 1,265.23 miles in 1905 was worth $70,599,484.81, that 1,644.58 miles in 1912 was worth as much as the Board found it to be worth, to-wit: $92,181,766, without the addition of the excess value. The suit to which the District Judge referred, in which he stated that the property of the plaintiff in 1905 was shown to have been worth more than seventy million dollars, was Louisville & Nashville Railroad Company, complainant vs. The Railroad Commission of Kentucky, defendant, and extracts from said suit showing the valuation placed upon the physical property of the L. & N. Railroad at that time will be found beginning on page 343, printed record.

It will also be seen that the witness, George W.

Lamb, for the plaintiff testifies on page 352, printed record:

"The total cost of road and equipment as of June 30, 1912, is shown as $83,154,904.19."

But he insists that there should be deducted from this sum $17,775,828.02 on account of depreciation, but there is no good reason shown why that depreciation should be deducted.

THE FEDERAL COURTS HAVE NO JURISDICTION OF THIS CAUSE, BECAUSE NO FEDERAL QUESTION IS INVOLVED AND BECAUSE IT IS A SUIT AGAINST THE STATE OF KENTUCKY.

The argument that this is a suit against the State of Kentucky is fully stated in the brief filed in the Illinois Central Case and in the brief filed in cases of Louisville Railway Company and Louisville & Interurban Railway Company, which will be heard with this action, and we shall not deal with this question at great length.

The Board of Valuation and Assessment in assessing plaintiff's franchise for the year 1913, proceeded under statutes of the State of Kentucky, which are constitutional, and which have been so held by the Supreme Court in the case of Adams Express Company vs. Kentucky, 166 U. S. 171. The petition does not allege that the statutes are unconstitutional. It is alleged in the petition that the Board of valuation and Assessment did not proceed in accordance with the provisions of the statutes prescribing its duties.

The fourteenth Amendment to the Constitution of the United States in so far as it refers to equal protection of the laws and due process of law, which two grounds are the entire basis of plaintiff's cause of action, has reference to the action of the state itself and not to the action of inferior officers of the state who exceed the authority conferred upon them by the state. A state must deny a person the equal protection of the laws or due process of law, and the State can only speak through its legislative, judicial or executive bench.

If a statute is unconstitutional and officers of a state proceed under such unconstitutional statute the action

of the officers may be considered the action of the state. If the statute is constitutional and officers of the state proceed in accordance with the statute, it is utterly impossible to deprive a person of equal protection of the laws or due process of law. A statute cannot be constitutional and at the same time violate the provisions of the Fourteenth Amendment to the Constitution of the United States.

The basis of suits to enjoin state officers from the performance of duties pursuant to a statute must be that the statute itself is unconstitutional. If officers of the state follow the provisions of an unconstitutional statute in obedience to the mandates of the state then it may be well said that the state is depriving a person of his rights guaranteed to him by the Fourteenth Amendment, but if the inferior officers of a state disobey the mandates of the state, then the act of disobedience becomes an individual act and if it is an individual act it is not the act of the state, and if it is not the act of the state the provisions of the Fourteenth Amendment cannot be invoked.

The very minute that plaintiff in this action admits that the statutes under which the board acted are constitutional it admits itself out of court so far as the Federal Courts are concerned. When it is admitted that the individual officers have done the alleged injury to plaintiff the provisions of the Fourteenth Amendment are not available to plaintiff, and as the plaintiff is a Kentucky corporation and as the members of the Board are residents of Kentucky, there is no diverse citizenship and plaintiff cannot invoke relief in the Federal Courts.

We do not mean to take the position that the state can only deny the equal protection of the laws and due process of law through its legislative branch, but such denial may be made through the judicial branch. It is alleged in the petition that the members of the board have acted in an unconstitutional manner. If this is true, it

is not the action of the state, but the plaintiff must seek its remedy in the state courts because the presumption always is that the state courts will not permit a violation of the statutes of the state.

If plaintiff had sought its remedy in the state courts, and the highest court of the State of Kentucky should so construe the statutes of Kentucky as to make them repugnant to the Fourteenth Amendment, then such construction of the statutes would become the action of the state and plaintiff might then seek its rights in the Federal Court. If inferior officers construe a statute in such a manner as to render it repugnant to the provisions of the Fourteenth Amendment, the construction of such officers amounts to nothing until the highest court of a state has approved such construction, and when the highest court of a state approves such construction then the action of the officers becomes the action of the state because made so through the judiciary of the state. This position has been upheld by the Supreme Court in a number of cases, and where it would seem that a contrary rule has been announced an examination of the facts in such cases will disclose that in every instance the act of inferior state officers has become the act of the state through approval by the highest court of the state. We cannot cite all of the authorities on this question as it has been before the court so often that volumes have been written in stating the principles that we have tried to summarize. We believe that the case of Barney vs. the City of New York, 193 U. S. 430, conclusively settles this question, and that since that opinion was rendered there has been no excuse for any litigant to misconceive his forum. A few quotations from that case will serve to elucidate what we have tried to say. The court there said:

"Controversies over violations of the laws of New York are controversies to be dealt with by the courts of

the State. Complainant's grievance was that the law of the State had been broken, and not a grievance inflicted by action of the legislative or executive or judicial department of the State; and the principle is that it is for the State courts to remedy acts of State officers done without the authority of, or contrary to, State law. Missouri vs. Dockery, 191 U. S., 165, ante, 133, 24 Sup. Ct. Rep., 53; Civil Rights Cases, 109 U. S., 3, 27 L. Ed., 835, 3 Sup. Ct. Rep., 18; Virginia vs. Rives, 100 U. S., 313, 25 L. Ed., 665."

In the same case, in quoting from Virginia vs. Rives, 100 U. S. 313, the court used this language:

"When a statute of the State denies his right or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of 641. But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong. If the accused is deprived of the right, the final and practical denial will be in the judicial tribunal which tries the case, after the trial has commenced. If, as in this case, the subordinate officer whose duty it is to select jurors fail to discharge that duty in the true spirit of the law; if he excludes all colored men solely because they are colored; or if the sheriff to whom a venire is given, composed of both white and colored citizens, neglects to summon the colored jurors only because they are colored; or if a clerk whose duty it is to take the twelve names from the box rejects all the colored jurors for the same reason,—it can with no propriety be said that the defendant's right is denied by the State and cannot be enforced in the judicial tribunals. The court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected in a superior

court. We cannot think such cases are within the provisions of section 641. Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

And again in the same opinion, quoting from the Civil Rights Cases, 109 U. S. 3, the court said:

"In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; *but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.*"

The case of Pennoyer vs. McConnaughy, 140 U. S. 1, is one of the leading cases discussing the maintainability of a suit such as the case at bar. In that case the court said:

"It is well settled that no action can be maintained in any Federal Court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that 'no State shall pass any law impairing the obligation of contracts.' This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself.

"In the application of this latter principle two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particullar case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. Re Ayers, 123 U. S., 443 (31 : 216); Louisiana vs. Jumel, 107 U. S., 711 (27 : 448); Antoni vs. Greenhow, 107 U. S., 769 (27 :468); Cunningham vs. Macon & B. R. Co., 109 U. S., 446 (27 : 992); Hagood vs. Southern 117 U. S., 52 (29 : 805.)

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, *and under the color of an unconstitutional statute*, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State. Osborn vs. Bank of United States, 22 U. S. 9 Wheat., 738 (6 : 204); Davis vs. Gray, 83 U. S., 16 Wall., 203 (21 :447); Tomlinson vs. Branch, 82 U. S., 15 Wall., 460 (21 : 189); Litchfield vs. Webster County, 101 U. S., 773 (25 : 925); Allen vs. Baltimore & O. R. Co., 114 U. S., 311 (29 : 200); Louisiana Board of Liquidation vs. McComb, 92 U. S., 531 (23 : 623); Poindexter vs. Greenhow, 114 U. S., 270 (29 : 185.)"

If the case at bar comes under the first class of cases referred to in the quotation, the suit cannot be maintained because it is a suit against the State, but if it comes within the second class of cases it cannot be maintained because the statutes under which the board acted are not uncon-

stitutional. The opinion in the case just cited, in discussing the question as to the maintainability of suits against the State, contains this language:

"It is believed that the case before us is within the principles of the great and leading case of Osborn vs. Bank of United States, 22 U. S., 9 Wheat 738 (6:204), the opinion in which was delivered by Chief Justice Marshall. That was a suit in equity, brought in the Circuit Court of the United States for the District of Ohio, by the president, directors and company of the Bank of the United States, to restrain Ralph Osborn, auditor of the State of Ohio, from executing a law of that State which was in violation of, and destructive to, the rights and privileges conferred upon the complainants by the charter of the bank and by the Constitution of the United States. One of the leading inquiries in the case was, whether an injunction could be issued to restrain a person, who was a state officer, from performing an official act enjoined by the statute of the State. The question presented by that inquiry was discussed, in a masterly manner, *on the assumption that the statute of the State was unconstitutional*, and it was held that, in such a case, grounds of equity interposition existing, injunction would lie.

"With regard to the objection, that if any case was made by the bill, for the interference of a court of chancery, it was against the State of Ohio, and was therefore within the prohibition of the Eleventh Amendment, the court held that the exemption of the State from suability could not be pleaded by its officers when they were proceeded against for *executing an unconstitutional act of the State*. This question was discussed most thoroughly, in the light of the other provisions of the Constitution relating to the jurisdiction of the federal courts, and the conclusion arrived at thus announced: 'It was proper, then, to make a decree against the defendants in the circuit court, *if the law of the State of Ohio be repugnant to the Constitution or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took or to those who received the money for which this suit was instituted.*' 22 U. S., 9 Wheat., 859 (6:233.)

"The statute of Ohio, under which the defendant was acting, was then examined and found to be unconstitutional. The case may then be said to have fully established the doctrine that an officer of a State may be enjoined from executing a statute of the State which is in conflict with the Constitution of the United States, when such execution would violate and destroy the rights and privileges of the complainant.

"The principle stated by Chief Justice Marshall (in that case), that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the Eleventh Amendment is limited to those suits in which the State is a party to the record,' has been qualified to a certain degree in some of the subsequent decisions of this court, and now it is the settled doctrine of this court that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record, as the court will look behind and through the nominal parties on the record to ascertin who are the real parties to the suit. New Hampshire vs. Louisiana and New York vs. Louisiana, 108 U. S., 76, (27:656); Re Ayers, *supra.*

"But the general doctrine of Osborn vs. Bank of United States, that the Circuit Courts of the United States will restrain a state officer from *executing an unconstitutional statute of the State,* when to execute it would violate rights and privileges of the complainant which had been guaranteed by the Constitution, and would work irreparable damage and injury to him, has never been departed from. On the contrary, the principles of that case have been recognized and enforced in a very large number of cases, notably in those we have referred to as belonging to the second class of cases above mentioned."

We find running through the opinion, as well as all other opinions on the same question, the basic idea of the maintainability of suits against the State, that is, that the statutes under which the State officers are attempting to act are, unconstitutional. This is shown in the quotation from the case of Board of Liquidation vs. McComb,

92 U. S., 531, found in the case just cited, which quotation is in part as follows:

"'The objections to proceeding against State officers by mandamus or injunction are: first, that it is, in effect, proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual; *and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter.* But it has been well settled that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In either case, *if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ.* An unconstitutional law will be treated by the courts as null and void.'"

In the Pennoyer case, in referring to the case of Poindexter vs. Greenhow, 114 U. S., 270, the court also shows that the basis of the action was the unconstitutionality of the statutes under which the officers were proceeding. The Court said:

"The defendant, under color of office, as tax collector, and acting in the enforcement of a statute of the State passed in 1882, which forbade the receipt of the coupons for taxes, refused to receive such tender and made the seizure complained of. It was held by this court that the Act of the General Assembly passed in 1882 was *unconstitutional and void,* because it was an impairment

of the contract entered into between the State and its bondholders by the Act of 1871; that, being unconstitutional, *it afforded no protection to the defendant;* that the action was properly maintainable against him, as a wrongdoer; and that it was not an action against the State, in the sense of the Eleventh Amendment."

To the same effect is the quotation from Hagood vs. Southern, 117 U. S. 52, which quotation is as follows:

" 'A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, *under color of authority, unconstitutional and void.*' "

The conclusion of the whole matter is thus stated in the Pennoyer case, *supra*:

"Little remains to be done or said by us in this connection, except to apply the principles announced in the cases we have attempted to review to the facts in the case before us, as set forth in our introductory statement. In this connection it must be borne in mind that this suit is not nominally against the Governor, Secretary of State and Treasurer, as such officers, but against them collectively, as the board of land commissioners. It must also be observed that the plaintiff is not seeking any affirmative relief against the State or any of its officers. He is not asking that the State be compelled to issue patents to him for the land he claims to have purchased, nor is he seeking to compel the defendants to do and perform any acts in connection with the subject matter of the controversy requisite to complete his title. All that he asks is, that the defendants may be restrained and enjoined from doing certain acts which he alleges are violative of his

contract made with the State when he purchased his lands. He merely asks that an injunction may issue against them to restrain them from acting under a statute of the State *alleged to be unconstitutional,* which acts will be destructive of his rights and privileges, and will work irreparable damage and mischief to his property rights. The case cannot be distinguished, in principle, from Orborn vs. Bank of United States, Davis vs. Gray, Louisiana Board of Liquidation vs. McComb and Allen vs. Baltimore & O. R. Co., cited above, and the reasoning in those cases applies with equal force in this. The essential difference between these cases and the case of Re Ayres, upon which the appellants mainly rely, was pointed out in the last named case, and need not be adverted to further in this connection. We think it clearly demonstrated from the authorities above referred to that the relief prayed can be granted, *if, as is contended for, the legislation of the State under which the defendants are assuming to act is unconstitutional,* in that it operates to impair the obligation of a contract. And this leads to a consideration of that legislation with respect to that contention."

Again in the case of Gunter vs. Atlantic Coast Line R. Company, 200 U. S., 273, this court makes it clear that the basis upon which suits may be maintained against officers acting for the State is that the statutes under which they act are unconstitutional. In that case in quoting from Smyth vs. Ames, 169 U. S., 466, the court said:

"'It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing *an unconstitutional enactment,* to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that amendment.'"

It is true that in that case the court held that a State might voluntarily become a party to a cause and submit its rights for judicial determination, and litigants have often been misled where that Federal Courts

have taken jurisdiction, because the State did not avail itself of its non-suability. The District Judge fell into the same error, and in doing so cited a number of cases in Kentucky where the State Board of Valuation and Assessment had been sued. It is true that a State may surrender its immunity, and in the last mentioned case this is made clear by the following language:

"Although a State may not be sued without its consent, such immunity is a privilege which may be waived; and hence, where a State voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment. Clark vs. Barnard, 108 U. S., 436, 447, 27 L. Ed., 780, 784, 2 Sup. Ct. Rep., 878."

The case of Fitts vs. McGhee, 172 U. S., 516, only elaborates the rule that the statutes under which State officers are acting must be unconstitutional or else the action is an action against the State. In the last mentioned case the court said:

"One of the arguments made in the Ayers case was that the circuit court had jurisdiction to restrain by injunction officers of the State from executing the provisions of State enactments *void by reason of repugnancy to the Constitution of the United States.* In support of that position reference was made to Osborn vs. Bank of the United States, 9 Wheat., 738 (6:204). But this court said: 'There is nothing, therefore, in the judgment in that cause, as finally defined, which extends its authority beyond the prevention and restraint of the specific act done in pursuance of the unconstitutional statute of Ohio, and in violation of the act of Congress chartering the bank, which consisted of the unlawful seizure and detention of its property. It was conceded throughout that case, in the argument at the bar and in the opinion of the court, that an action at law would lie,

either of trespass or detinue, against the defendants as individual trespassers guilty of a wrong in taking the property of the complainant illegally, vainly seeking to defend themselevs under the authority of a void act of the general assembly of Ohio. One of the principal questions in the case was whether equity had jurisdiction to restrain the commission of such a mere trespass, a jurisdiction which was upheld upon the circumstances and nature of the case, and which has been repeatedly exercised since. But the very ground on which it was adjudged not to be a suit against the State, and not to be one in which the State was a necessary party, was that the defendants personally and individually were wrongdoers against whom the complainants had a clear right of action for the recovery of the property taken, or its value, and that therefore it was a case in which no other parties were necessary. The right asserted and the relief asked were against the defendants as individuals. They sought to protect themselves against personal liability by their official character as representatives of the State. This they were not permitted to do, *because the authority under which they professed to act was void.'* And these were stated by the court to be the grounds upon which it had proceeded in other cases—citing Allen v. Baltimore & Ohio R. R. Co., 114 U. S., 311 (29:200); Poindexter vs. Greenhow, 114 U. S., 270, 282 (29:185, 190); United States vs. Lee, 106 U. S., 196 (27:171). The court further said: 'The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. *To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment re-*

quires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates. But this is not intended in any way to impinge upon the principle which justifies suits against individual defendants, who, *under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs,* nor to forbid suits against officers in their official capacity either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest.' "

It will be observed that in the case of Fitts vs. McGhee, a number of authorities were relied upon by counsel in support of the contention that a suit against an officer of the State was not a suit against the State. These cases are all cited in the opinion, but the court in disposing of the contention used the following language:

"Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a *State enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights.* There is a wide difference between a suit against individuals holding official positions under a State, to prevent them, under the sanction of an *unconstitutional statute,* from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the

constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law offiecrs of the State, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons. If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespass or wrong. Under the view we take of the question, the citizen is not without effective remedy when proceeded against *under a legislative enactment void for repugnancy to the supreme law of the land;* for, whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination."

It is true that the Eleventh Amendment provides in effect that a State shall not be sued by a citizen of another State, and it might be argued that the L. & N. Railroad Company is a citizen of Kentucky. Therefore, the provisions of the Eleventh Amendment cannot be in-

voked by the State, but this question was disposed of in the case of Fitts vs. McGhee in this language:

"Is this a suit against the State of Alabama? It is true that the Eleventh Amendment of the Constitution of the United States does not in terms declare that the judicial power of the United States shall not extend to suits against a State by citizens of such State. But it has been adjudged by this court upon full consideration that a suit against a State by one of its own citizens, the State not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a State by citizens of another State of the Union, or by citizens or subjects of foreign States. Hans v. Louisiana, 134 U. S., 1, 10, 15 (33: 842, 845, 847); North Carolina v. Temple, 134 U. S., 22 (33:849.)"

We desire also to call the attention of the court to Coulter vs. L. & N. Railroad, 196 U. S., 599. The parties to that suit were the same as the parties to the present action, except the names of the State officials are different. The questions there involved were the same questions as are involved in the case at bar. The District Judge who tried the case was the same judge who tried the case at bar. He decided that case upon the same grounds that he decided the case at bar, but his opinion was not upheld by the Supreme Court. The Supreme Court held in that case that the Circuit Court of Appeals could not properly take cognizance of the case. The reasons why that the circuit court could not properly take cognizance of the case are not stated in the opinion of the Supreme Court, but clearly it was because the Federal Courts did not have jurisdiction of the controversy.

The case of Ex Parte Virginia, 100 U. S., 339, seems, without careful consideration, to be an exception to the general rule, but in the case of Barney vs. City of New York, *supra,* this court held that the language used by

the court in Ex Parte Virginia was used on account of the fact that the final judgment of a State court was under consideration. This court there recognized that the Federal Courts did not have original jurisdiction of such questions where the unconstitutionality of the State statute was not alleged, but as the highest State court had interpreted the statute in that case in such a way as to deprive the complainant therein of property without due process of law or so as to deny the complainant the equal protection of the laws, and the officers were proceeding under such interpretation, this court held that the Federal Courts had jurisdiction.

It would appear that it was held in Reagan vs. Farmers Loan & Trust Company, 154 U. S., 362, that a suit might be brought in the Federal Court without alleging the unconstitutionality of the statute under which officers had proceeded, or without waiting for a decision from the highest State court, but in the Barney case, *supra,* the opinion in the Reagan case is referred to and the court distinguishes between the rule in the Barney case and the rule in the Reagan case, holding that the Reagan case is not in conflict with the Barney case because it is held that the Reagan case was brought in the Federal Court under authority contained in the State statute. The Barney case also refers to:

Manahttan R. Co. vs. New York, 18 Fed., 195.

Kiernan vs. Multnomah County, 95 Fed., 849.

Re Storti, 109 Fed., 807.

Scott vs. McNeal, 134 U. S., 34.

Chicago B. & R. Co. vs. Chicago, 166 U. S., 226.

And distinguishes those cases from the rule announced in the Barney case, and in making the distinction the court said:

"But in this case judgments of the highest judicial tribunals of the State were treated as the acts of the State, and no question of the correctness of that view arises here."

The closing language in the Barney case is exceedingly applicable to the controversy arising in the case at bar. The court said:

"In the present case defendants were proceeding, not only in violation of provisions of the State law, but in opposition to plain prohibitions."

If the Federal Court had no jurisdiction in the Barney case because the defendants were proceeding not only in violation of provisions of the State law but in opposition to its plain prohibitions, the same must be true in the case at bar because if the allegations of plaintiff's petition are true the defendants were not only violating the provisions of the laws of Kentucky, but were acting in opposition to the plain prohibitions of such laws.

The case of Raymond vs. Chicago Union Traction Company, 207 U. S., 20, is relied upon by the District Judge, as well as counsel for plaintiff, to support the right of palintiff to maintain this action. We think that the Barney case places the Raymond case in that class of cases where the judgments of the highest judicial tribunals of the State were treated as the acts of the State, and that for this reason the Federal courts might take jurisdiction. It will also be observed that this court said in that case that the facts therein made it exceptional. In the Raymond case the assessing authorities had made an assessment. Suit was instituted in the State court against the Board asking that it be mandamused and compelled to treat the first assessment as void and make another assessment. The relief sought was granted and the case went to the highest court in Illinois and was there affirmed, and the Board ordered to treat the first assessment as void and make another assessment of complainants' property. The Board did this under the order

of the highest court in the State, and the Supreme Court held that the Board, acting under such circumstances, was acting for the State and was not acting of its own free will, and for that reason the Federal court had original jurisdiction in the suit which was instituted to have the assessment declared void.

This decision is not in conflict with the position we assume. The officers in that case were acting pursuant to the directions of the highest judicial power in the State. It is true that the highest court in Illinois had passed on the question in rather an indirect manner. However, the case had been adjudicated in the highest judicial tribunal of the State, and owing to the exceptional facts in the case the Federal court assumed jurisdiction. In the Raymond case it would have been useless to again take the case to the highest court in Illinois, because the assessment was made pursuant to an order of that court.

No such contention can be made in the case at bar. It must be presumed that the State courts will not permit the subordinate officers of the State to violate the laws of the State. It must be presumed that the State courts will not so construe a constitutional statute as to render it repugnant to the Federal Constitution. If the officers whose duty it is to carry into effect the provisions of a constitutional act misconstrue the provisions of the act and, under the construction of such officers, the act becomes repugnant to constitutional provisions, all parties concerned must look to the State courts for relief. If the State courts uphold the wrongful and unconstitutional acts of the officers and so construe the State statute as to render it repugnant to the Federal Constitution, the case may then go to the Supreme Court.

The dissenting opinion in the Raymond case contains this statement:

"So far as I know this is the first instance in which a circuit court has been held authorized to take jurisdiction on the ground that the decision of a State tribunal was contrary to the Fourteenth Amendment."

In view of the language used in the Barney case we are inclined to the opinion that Justice Holmes was mistaken in saying that it was the first instance where a Federal court had taken jurisdiction on the ground that the decision of a State tribunal was contrary to the Fourteenth Amendment, but the language which he uses must have a different meaning to the language used in the Barney case. This language from Justice Holmes must have had some relation to the exceptional features of the Raymond case which are alluded to in the majority opinion.

To place the construction upon the Raymond case which is contended for by the District Judge and counsel for plaintiff, would render it in conflict with every decision on the same question. It is true that among the numerous decisions bearing upon the questions under discussion there has never been another case similar to the Raymond case, and the case at bar certainly bears no similarity to it other than that the allegations in plaintiff's petition are in part copied from the decision of the court in that case. It is true that in that case the officers have acted under a constitutional statute. Their acts have been made a matter of record, but the highest court in the State set aside the action of the officers and directed them to act differently. This they did, but in so acting differently the act was not their act, but the act of the highest judicial tribunal in the State. They were not officers who wilfully or wrongfully acted in violation of a statute. They were made to act as they did, and they were made to so act through the directions of the State speaking through one of the co-ordinate

branches of the State government, the Supreme Court of the State. If the Board of its own free will had acted contrary to the statute the act would not have been the act of the State and the Federal court would have had no jurisdiction unless the highest judicial tribunal in the State should have approved the wrongful acts of the officers.

As proof of the fact that the board in the Raymond case did not act voluntarily in making that assessment, the opinion of the District Judge in that case sets out the fact that on the same date that the assessments which were made by the board under the order of the Supreme Court were fixed by the board, the same board, acting of its own free will, assessed the property of the same corporation for a different year upon much the same state of facts, at a much lower figure. Besides all this in the Raymond case there is nothing to show that any defense was interposed on the grounds that the action was a suit against the State.

The District Judge lays great stress on Ex Parte Young, 209 U. S., 123. There is nothing in this case in conflict with the views which we have attempted to express, and the contentions which we have attempted to make. That case sustains our contentions. Young undertook to perform a duty required of him by the State under an unconstitutional statute. He was acting for the State under authority which was void, and, therefore, no protection to him. This case, therefore, falls within the class of cases discussed and distinguished in the Barney case. The act of Young was the act of the State because he had been directed to so act by the Legislature of the State. It was the State, through an unconstitutional statute, that was depriving parties of their property without due process of law. When an officer undertakes to enforce against parties affected, an unconstitutional act,

violating the Federal Constitution, such officer may be enjoined in a Federal court of equity. The trouble that plaintiff has with the Young case is that it does not apply to the facts in the case in controversy, because there is no unconstitutional statute in this case.

There is yet another reason why the principles in the Young case are not applicable to the case at bar. In the Young case the State only had a governmental interest in the welfare of its citizens in compelling obedience to the legal orders of its officials for the benefit of the public at large. In the case at bar the interest of the State is that of an artificial person. Here the State has a direct pecuniary interest in the matter in controversy.

This brings us to a consideration of the case of Home Telephone and Telegraph Company against Los Angeles, 227 U. S., 278. We do not think that this case is against the position which we have assumed. We have never insisted that an officer of a State may not deny a person the privileges and immunities to which he is entitled under the provisions of the Fourteenth Amendment, if such officer is acting for the State, but acting in an unconstitutional manner. If he is acting under an unconstitutional statute, his act is the act of the State, or if he is acting under a constitutional statute and acting in such a manner as to deprive a person of constitutional rights guaranteed by the Federal Constitution, and such an act on the part of such officer has the approval of the State not only through the legislative government, but through either of the three branches of government, the Federal court has jurisdiction.

In the case last cited the Legislature of California had conferred power upon the city of Los Angeles to enact an ordinance for the government of the city. Under the power thus granted by the Legislature, the city of Los Angeles passed an ordinance regulating the rates

that might be charged by Telephone Companies. The act of the city of Los Angeles pursuant to authority granted by the Legislature of the State was the act of the State, and as the ordinance was shown by the averments of the petition to be confiscatory in character, it was in violation of the provisions of the Fourteenth Amendment to the constitution of the United States, and officers acting under the provisions of said ordinance, were acting in pursuance to authority vested in them by the State, and as they were so acting, their acts were the acts of the State, and if their acts were the acts of the State, the State was denying to the Telephone Company the equal protection of the laws, or due process of law. It is true that in the case last cited, the court lays down certain rules which seem to indicate that an officer acting contrary to the provisions of the laws of the State may deny a person the equal protection of the law, or due process of the law, and his act will be construed as the act of the State.

To say the least of it, if the officer is acting under a constitutional statute in a constitutional way, as is true in the case at bar, there certainly can be no grounds of Federal jurisdiction. Then, again, if the officer of the State is acting for the State and his acts are within the provisions of a constitutional statute, a suit against such an officer would unquestionably be a suit against the State.

If the plaintiff in this case is entitled to be heard in a Federal court, it must show that the act of the State Board of Valuation and Assessment in assessing this property for the year 1913, was the act of the State, and if it succeeds in showing that the act of said Board was the act of the State, then it has shown that a suit against said Board is a suit against the State and prohibited by

the Eleventh Amendment of the constitution of the United States.

In other words, we have exactly the thing in this case that the court suggests might happen in the case last cited (227 U. S., 278) in this paragraph from the opinion of the court.

"It would certainly be open to controversy if the proposition were carried to its logical result, whether the only right under the fourteenth amendment, which the proposition admits, to exert Federal judicial power growing out of wrongful acts of State officers, would not be unavailable. This naturally suggests itself, since if there be no right to exert such power until, by the final action of a State court of last resort, the act of a State officer has been declared rightful and to be the lawful act of the State as a governmental entity, the inquiry naturally comes whether, under such circumstances, a suit against the officer would not be a suit against the State, within the purview of the Eleventh Amendment."

It must be remembered that the Statutes under which the Board has proceeded have been held constitutional not only by the highest court in the State of Kentucky, but also by the Supreme Court of the United States. It must also be remembered that the question as to whether the State Board of Valuation and Assessment acted within its rights in assessing plaintiff's property at a higher value in proportion than the local assessors throughout the State have assessed the property within the counties, has also been passed upon by the highest court in the State of Kentucky in the case of Louisville Railway Company against Commonwealth, 105 Kentucky, 710. We have then this state of facts: The State Board of Valuation and Assessment has proceeded under a constitutional statute and the petition alleges that in a proceeding under the constitutional statute, the plaintiff has been denied the equal protection of the law, be-

cause the local taxing officers throughout the State have assessed the property at a less value than is provided by the constitution and laws of the State.

The Court of Appeals of Kentucky has held that the State Board of Valuation and Assessment has no right to depart from the constitutional standard, because other assessing officers may have so departed, and if the Board of Valuation and Assessment has proceeded to assess the property of the plaintiff, in a constitutional way pursuant to the mandates of the highest court in the State, the act of said officers must be the act of the State, and if this is true it follows that the State cannot be sued, and that a suit against this Board is a suit against the State.

As showing that the act of the Board of Valuation and Assessment in assessing the property of plaintiff for taxation for the year 1913 was the act of the State, we beg to call the attention of the court to the allegations in the petition contained in paragraph sixteen, which allegations are as follows:

"The said Board of Valuation and Assessment is one of the instrumentalities provided by the State of Kentucky, for the purpose of raising the public revenue by way of taxation. In regard to plaintiff and other public service corporations, it is the duty of that Board to make an original assessment of their franchises on intangible property. From the decision of the Board in making such assessment no appeal is provided for, and such decision is final, except as proceedings for relief may thereafter be taken in the courts. Acting under the laws of the State, the State Board represents the State, and its action is the action of the State. Plaintiff therefore states that, in as much as said Board with respect to its action in valuing and assessing plaintiff's franchise on tangible property for taxation in the State of Kentucky proceeded upon erroneous principles and adopted an illegal and improper mode or manner of estimating such value, and reaching such assessment, and

acted arbitrarily and fraudulently, as herein set forth, its action in these respects was and is the action of the State through said Board, and if carried out or enforced would violate the provisions of Section One of the Fourteenth Amendment to the Constitution of the United States, by depriving plaintiff of its property without due process of law, and by denying to it equal protection of the laws."

This quotation is taken almost bodily from the opinion of this Court in the Raymond case. As we have sought to show, there is nothing to support the allegations contained in this paragraph, that the Board acted either arbitrarily or fraudulently, and as there is nothing to show that the Board followed an erroneous method, or if it did follow an erroneous method, it did not as the result thereof, place a value upon plaintiff's property greater than its actual value, there is nothing left in plaintiff's contention that the Board has denied it equal protection of the law, except the contention that there has been a discrimination against plaintiff, because the Board has followed the law, when the local assessors throughout the State have not followed the law. There is nothing in this contention to show that plaintiff has been deprived of any rights guaranteed to it by the Federal Constitution. If a State has the right to classify property and place a different rate of taxation upon different classes of property, without a violation of the Federal Constitution, and the State officers who without statutory authority assess one class of property upon a higher percentage of its real value than they assess another class of property, it cannot be well said that any provision of the Federal Constitution has been violated.

In the case of Coulter against the Louisville and Nashville Railroad Company, 196 United States 669, the court had under consideration exactly the same charac-

ter of case that it now has between the same parties. In that case the court said:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from the tangible property in the State, there can be no question that the State had power to tax it at a different rate, so far as the Constitution of the United States is concerned."

If there is nothing in the Constitution of the United States which prohibits taxing authorities of Kentucky from taxing the franchise of a corporation from a different rate to that at which other property is taxed, there can be no Federal question in the case at bar. In the same case the court in passing upon the question as to whether the suit was a suit against the State, disposed of the matter with this brief language:

"We need not stop to show that so much of the bill as seeks an injunction against collecting the State tax, and the portion of the decree which orders a receipt to be executed on the part of the State, can not be maintained."

As that was a suit involving the same questions and between the same parties as in suit at bar, it must follow that so much of plaintiff's petition in the present suit that seeks an injunction against collecting taxes due the State, can not be maintained.

IF IT BE TRUE THAT THE LOCAL TAX ASSESSORS IN EACH COUNTY ASSESS PROPERTY, WHICH IT IS THEIR DUTY TO ASSESS, AT LESS THAN ITS FAIR CASH VALUE ESTIMATED AT THE PRICE IT WOULD BRING AT A FAIR VOLUNTARY SALE, THE PLAINTIFF FOR THIS REASON IS NOT ENTITLED TO ANY RELIEF, IF ITS PROPERTY IS NOT ASSESSED AT MORE THAN ITS FAIR CASH VALUE ESTIMATED AT THE PRICE IT WOULD BRING AT A FAIR VOLUNTARY SALE, ALTHOUGH IT MAY BE ASSESSED AT A HIGHER PERCENTAGE OF ITS VALUE THAN THE PROPERTY ASSESSED BY LOCAL ASSESSORS.

For the year 1902 the State Board of Valuation and Assessment fixed the value of the property of the plaintiff in this present action in the State of Kentucky at the sum of $33,788,724.50, and deducted the assessed value of the tangible property as made by the Railroad Commission for that year, to-wit: $23,013,825, leaving a franchise value of plaintiff's property in Kentucky for that year of $10,774,899.50. One of the chief contentions in that suit was that the property assessed by local county assessors was not assessed for taxation at above 80 per cent of its fair cash value while the plaintiff's property had been assessed at its full value.

The allegation of the bill of complaint on this point was as follows:

"Your orator did appear before said Board and showed cause against said assessment, and among other things insisted that your orator's property should not be assessed above the general level of values fixed for all other property in the State except property of those corporations required to report to the Board of Valuation and Assessment and your orators showed to the said Board that the property of all citizens and corporations who are not required to report to the Board of Valuation and Assessment, had been equalized on th

basis of not over 80 per cent. of its cash value, whereas your orators' property is assessed certainly at its full value, and that your orator is thus made to bear undue proportion of the burdens of the State government, and is denied the equal protection of the laws."

A vast amount of proof was taken on this point as will be shown by that record and upon final hearing before the District Judge for the Eastern District of Kentucky, who is the same judge before whom the case at bar was tried. It was held that property in the State of Kentucky was uniformly under assessed by the local county assessors and plaintiff was granted the relief sought.

The opinion of the District Judge in that case is reported in 131 Fed. 306. The case went to the Supreme Court and the opinion in the case is reported in 196 U. S. 669. We thought that the opinion in that case forever disposed of the question which had been raised. The District Judge in his opinion alludes to the fact that the State made no particular effort to introduce proof to show that property is not uniformly under assessed in Kentucky, and he seems to intimate that this was an admission on the part of the State that property is uniformly under assessed by the County Assessors in the State.

We might say that there were two reasons why that no more evidence was introduced showing that property is not uniformly under assessed. The first is that we relied upon the opinion of the Supreme Court in which it held against the plaintiff's contention in the case cited above, and where it was said by the court:

"If it be a fact that the franchise of a Kentucky corporation is taxed at a different rate from tangible property in the State, there can be no question that the State had power to tax it at a different rate, so far as the Constitution of the United States is concerned."

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The other reason was that from an examination of the record in the Coulter case we were convinced that the evidence in the case at bar in behalf of plaintiff on this point was not nearly so strong as it was in the Coulter case, and we were also convinced that no competent evidence was produced by the plaintiff to show that property is uniformly under assessed in the State of Kentucky. The court will take judicial notice of the case of Coulter vs. The L. & N. R. R. Company.

Missouri vs. C. B. & Q. R. R., 241, U. S. 536.

We shall attempt to discuss briefly the right of the plaintiff to relief on the grounds that the property assessed by the local tax assessors throughout the State is not assessed at as high percentage of its value as the property of plaintiff. We shall contend: 1. That there is no proof sufficient to show that property is uniformly, systematically, habitually and intentionally under-assessed by the local county assessors in the State, and 2, that if it should be true that property is so under-assessed by the local county assessors, the plaintiff can not complain if its property is not assessed at more than the fair cash value estimated at the price it would bring at a fair voluntary sale.

The petition alleges that the property of individuals in the State of Kentucky and the property of corporations in the State of Kentucky which is not assessed by the State Board of Valuation and Assessment is assessed uniformly, systematically, habitually and intentionally at less than its fair cash value estimated at the price it would bring at a fair voluntary sale and at not exceeding 60 per cent. of its fair cash value, while plaintiff's property is assessed at a higher rate, and that for this reason the rate of taxation in the State of Kentucky is not uniform.

It is true that Section 171 of the Constitution of Kentucky requires that taxes shall be uniform on all property subject to taxation within the territorial limits

of the authority levying the tax, and that Section 172 of the Constitution requires that all property not exempted from taxation shall be assessed for taxation at its fair cash value estimated at the price it would bring at a fair voluntary sale. The two sections mean the same thing. The same rate must be applied to all classes of property and all classes of property must be assessed at the fair cash value of the property estimated at the price it would bring at a fair voluntary sale. This is the only standard that the State of Kentucky has provided for the assessment of property for taxation. The people themselves provided the standard and the only act of the State in fixing the rule for the assessment of property is to be found in these sections of its fundamental law. No court in Kentucky has ever held that property must be assessed in any proportion of its fair cash value, but that all property subject to taxation must be assessed at its full fair cash value.

If any officer of the State who has taken the constitutional oath, which all officers are required to take, and it is the duty of such officer to assess property for taxation, assesses it for less than its fair cash value as provided in the Constitution, he is guilty of false swearing, and yet the District Judge and the plaintiff in this action take the position that all the citizens in the State of Kentucky and all the assessing officers in the State of Kentucky commit the offense of false swearing annually.

A large number of the States, probably more than half of them, permit the classification of property for the purposes of taxation, and the Supreme Court has never held that it is discrimination to classify property for taxation and apply a different rate to different classes of property so long as the rate is uniform on the same class of property. Since the beginning of this litigation Kentucky has joined the number of States which

permit classification of property for taxation. We repeat that if the property of the plaintiff is not assessed at more than its fair cash value, the plaintiff is not required to pay any more than its just proportion of the burdens of taaxtion. The fact that one man pays less than he owes does not give another man a just right to complain so long as the other man does not pay more than he does.

The opinion of the Court of Appeals of Kentucky in case of Louisville Railway Company vs. Commonwealth, 105 Ky., page 710, thus states the rule, and it seems to us that the reasoning is unanswerable:

"The contention of counsel for appellant is to the effect that, if other officers of the State disregard the constitutional provision and the statutes requiring them to assess property at its fair cash value, the courts should adjudge that the action of the Board of Valuation and Assessment in assessing franchises at their fair cash value, estimated at the price they would bring at a fair voluntary sale, should be set aside. It is certainly an unusual demand that the action of officers should be disregarded, although they may have acted in strict conformity to the law imposing the duty. The officers take an oath that they will faithfully discharge their duties, and, if they have due respect for their oaths, they are bound to follow the requirements of the organic and statutory law of the State. There never can be exact equality and uniformity in taxation. The purpose of the constitutional provision in question was to require all property to be assessed at its fair cash value. There is no way to execute that provision of the Constitution, except officers be selected by the people for the purpose of assessing the property, that revenue may be raised to carry on the government. It does not seem to be logical, or sound in principle, to say that because one officer, or a class of officers disregard the law, the action of those who strictly follow it, *for that reason,* should be annulled. If that be a proper view,

then the constitutional provision and the statutes become a dead letter, and the courts will be continually called upon to disregard the legal actions of legally constituted officers because other officers in the State have acted illegally. The court is called upon to constitute itself an instrument, not to uphold the Constitution, but to make complete the utter disregard of its provisions, by not sustaining a proper and legal action of the officers of the State in the performance of their duties. If the officers of the State are not properly assessing the real and personal property of the several counties of the State, and if the Railroad Commissioners of the State are not faithful in the discharge of their duties in assessing the railroad property of the State, then there must be a change of the personnel in the various offices of the State so as to bring about a condition, in so far as possible, that equality of assessment and taxation can be had. A speedier way would be to enforce the penal and criminal statutes of the State, if they are being violated. If they are, the prosecution of an officer would suffice to correct the evil complained of. It may be said that this will take time, and cause some of the taxpayers of the State to bear an unequal proportion of the burdens of taxation. It is far better that this should be done for a short time, rather than for the courts to adjudge illegal that which the organic law of the State declares is legal. We can not give our consent to declare void a proceeding because such a proceeding *conforms to the law.*"

In the Louisville Railway case the Court of Appeals quotes from the opinion of the Massachusetts Court in the case of City of Lowell vs. County Commissioners of Middlesex, and also from the New Jersey Court in case of Central Railroad Company vs. State Board of Assessors. These cases admirably state the law controlling the question sought to be raised in this case, and do not leave the mind in doubt as to the correct rule. As to the effect that must be given to the construction placed upon

the taxing laws of the State by the State court when the question is brought in issue in the Federal Court, we have the rule well stated in case of Bell's Gap Railroad Company vs. Commonwealth of Pennsylvania, 134 U. S. 239, where the court said:

"This might have been subject to question under the State laws; but the State courts have upheld the assessment as valid. We are to accept it, therefore, as part of the State system of taxation, authorized by its Constitution and laws. Then how does it violate any provision of the Constitution of the United States? It is contended that it violates the first section of the XIV Amendment, which forbids a State to withhold from any person the equal protection of the laws. We do not perceive that the assessment in question transgresses this provision. There is no unjust discrimination against any persons or corporations. The presumption is that corporate securities are worth their face value. Besides, the person that holds them is not affected by the tax unless he receives his interest from which the tax is deducted. So long as the interest is paid the security has to him full productive value; when it is not paid he pays no tax.

"But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the XIV Amendment, that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such reg-

ulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the XIV. Amendment was not intended to compel the States to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt.

"The general purpose and scope of the XIVth Amendment, and the general qualifications necessary to be applied to it, are well stated in Barbier v. Connolly, 113 U. S., 27, 31 (28: 923, 924). Mr. Justice Field, in delivering the opinion of the court, there said: 'The XIVth Amendment, in declaring that no 'State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and their property, the prevention and

redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes called the police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity.'

"With due regard to these considerations, we are clearly of the opinion that the method of assessing the tax in question, on the face value of corporate securities in Pennsylvania, is not violative of the XIVth Amendment to the Constitution."

In the case of Pacific Express Company vs. Seibert, 142 U. S., 339, the court again announces the doctrine that it is not violative of the provisions of the Constitution of the United States to assess different classes of property at different rates and in different manners and by different methods. The court there said:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens."

We also desire to call the attention of the court to the case of Traveler's Insurance Company vs. Connecticut, 185 U. S., 364. The law is there thus stated:

"But, further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. *The courts are not authorized to ubstitute their views for those of the Legislature.* We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents.

"This court has frequently held that mere inequality in the results of a State tax law is not sufficient to invalidate it. Thus, in Tappan vs. Merchants' Nat. Bank, 19 Wall., 490, 504, 22 L. Ed., 189, 195, it was said: 'Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems adjusted with reference to the valuation of different kinds of property are adopted. The courts permit this.' "

A quotation from the State Railroad Tax Cases, 92 U. S., 575, may also be set out:

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most

nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, *the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded.*'"

And the rule is further elaborated in the case of Home Insurance Company of New York vs. People of the State of New York, 134 U. S., 594:

"By the terms 'corporate franchise or business,' as here used, we understand is meant (not referring to corporations sole, which are not usually created for commercial business) the right or privilege given by the State to two or more persons of being a corporation, that is, of doing business in a corporate capacity, and not the privilege or franchise which, when incorporated, the company may exercise. The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name and act as a single person, with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State, and, of course, when granted, may be accompanied with such conditions as its Legislature may judge most befitting to its interests and policy. It may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay a specific sum to the State each year, or month, or a specific portion of its gross receipts, or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe. The

validity of the tax can in no way be dependent upon the mode which the State may deem fit to adopt in fixing the amount for any year which it will exact for the franchise. No constitutional objection lies in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privileges it bestows. It may well seek in this way to increase its revenue to the extent to which it has been cut off by exemption of other property from taxation. As its revenues to meet its expenses are lessened in one direction, it may look to any other property as sources of revenue, which is not exempted from taxation. Its action in this matter is not the subject of judicial inquiry in a Federal tribunal."

The State has the right to impose taxes upon a corporation, and the system of taxation as applied to corporations may be altogether different from that applied to other property, and yet there is no violation of the provisions of the Constitution of the United States. This was so held in Delaware Railroad Tax Case, 85 U. S., 206:

" 'The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however, arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the Legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' "

And further in the same opinion the court said:

"Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no State shall deprive any person within its jurisdiction of the equal protection of the laws. It is conceded that corporations are per-

sons within the meaning of this amendment. It has been so decided by this court. Pembina Con. Silver Co. v. Pennsylvania, 125 U. S., 181 (31: 650). *But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property.* Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class. See Barbier v. Conolly, 113 U. S., 32 (28: 925); Soon Hing v. Crowley, Id., 709 (1147); Missouri Pac. R. Co. v. Hume, 115 U. S., 523 (29: 466); Missouri R. Co. v. Mackey, 127 U. S., 209 (32: 109); Minneapolis R. Co. v. Beckwith, 129 U. S., 32 (32: 588)."

For a clear discussion of the objects of the Fourteenth Amendment with reference to equal protection of the laws, which discussion is applicable in the case at bar, we desire to refer to the case of Bowman vs. Lewis, 101 U. S., 22, where the court said:

"If, however, we take into view the general objects and purposes of the Fourteenth Amendment, we shall find no reasonable ground for giving it any such application. These are to extend United States citizenship to all natives and naturalized persons, and to prohibit the States from abridging their privileges or immunities, and from depriving any person of life, liberty or property

without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made. The amendment could never have been intended to prevent a State from arranging and parceling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in view, or could have been included, in the prohibition that 'No State shall deny to any person within its jurisdiction the equal protection of the laws.' It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States; and does not deprive any person of his rights without due process of law, nor deny to any person the equal protection of the laws, including the equal right to resort to the appropriate courts for redress. The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject matter, amount or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts; one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto.

"We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to pre-

vent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City, and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

And we also will refer to Railroad Tax Cases, 115 U. S., 321, where the court used this language:

"The discrimination against railroad companies and their property, which is the subject of complaint as being unjust and unconstitutional, arises from the fact that, in the legislation of Kentucky on the subject, railroad property, though called real estate, is classed by itself as distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining their value for purposes of taxation, and differing as well from those applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas and water companies. These latter report to the Auditor the total cash value of their property, and pay into the treasury as a tax, upon each one hundred dollars of its value, a sum equal to the tax collected upon the same value of real estate; and their reports and valuations are treated as complete and perfect assessments, not subject to revision by any board or court, and conclusive upon the taxing officers.

"But there is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method, upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. *There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained.* The different nature and uses of their property justify the discrimination in this respect which the discretion of the Legislature has seen fit to impose."

If a State may classify property for taxation without violating any of the provisions of the Constitution of the United States, and the assessing officers of the State are acting for the State and their acts are the acts of the State, and they do that without legislative authority which they may do with legislative authority so far as the Constitution of the United States is concerned, there is no just grounds for complaint. There is no complaint that there is a discrimination in the assessment of railroad property, or at least no such contention is pressed, and there is no proof to substantiate an allegation of this nature.

The District Judge seems to be clearly of the opinion that property is uniformly, intentionally, systematically and habitually under-assessed in the State of Kentucky. He even goes so far as to say that the courts will take judicial knowledge of the under-assessment of property in that State. And yet, with his learned argument in support of his position, he is unable to deduce any au-

thority in support of his contention other than a few cases decided by District Judges. His opinion is well worth reading, because it answers itself.

In the Coulter case, supra, this court said:

"It is not contended that a mere under valuation would be enough. It is admitted that it must have been systematic and intentional."

This language itself should dispose of the contention made by plaintiff that property is uniformly under-assessed in the State, because there has been no effort to show that the property was intentionally under-assessed, or that it was systematically done, but the court makes the language even stronger further along in the opinion, where it is said:

"Inequality, we repeat, is nothing unless it was in pursuance of a scheme."

The District Judge says it is not certain what the court meant in using this language, but it does seem that the language is perfectly clear, and what is meant by a "scheme" is too well known to need discussion. I do not suppose that there is any one who would contend that if the County Assessors should deliberately enter into an understanding among themselves, or if any great number of them should enter into an understanding, that they would intentionally under-assess property, and, that pursuant to such understanding property was under-assessed, and that this under-assessment was for the purpose of placing a greater burden upon the property of corporations or other individuals, that such action on the part of the assessors would not be in violation of the provisions of the Fourteenth Amendment. There has never been an intimation in this case that any such understanding or scheme was worked out between the County

Assessors. It has never been shown that as many as two County Assessors had a meeting and discussed the matter, or that any correspondence ever passed between any of them, or that there was ever any discussion, either publicly or privately, of entering into a scheme or plan to under-assess property in the State. Going still further with this idea, this court in the case of C. B. & Q. R. R. Co. vs. Babcock, supra, said that the under-assessment must be pursuant to an agreement. The language speaks for itself:

"A point less pressed than the foregoing was that the other property in the State was greatly undervalued, and that thus the rule of uniformity prescribed by the Constitution of Nebraska had been violated. Upon this matter it is enough to say that no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the Board of Equalization and Assessment."

The District Judge belittles the effort of the State to show by the affidavits of the County Assessors, who assessed the property for the year in which plaintiff's property was assessed, and which assessment is now in controversy, that no scheme or agreement was entered into between the assessors or any of them. We conceded it to be true, and we based our conception upon the decisions of the Supreme Court, that mere under-assessment, unless done in pursuance to a scheme or agreement between the assessing authorities, did not amount to anything. We thought that unintentional under-assessment on the part of an assessing officer, if the case stood alone or without any understanding with any other assessing officer in the State, amounted to nothing. We still think so. The District Judge in his opinion said:

"Those who would perpetrate the sham and pretense that property generally in this State is not uniformly and intentionally undervalued to a substantial degree, and would have the courts sanction its perpetuation, have withdrawn entirely from the objective field, save in the particular as to the existence of an agreement amongst the county assessors, which no one claims, and entered the subjective, where it may be thought that it is more difficult to determine the truth."

The learned Judge is very much mistaken in his statement. No one has withdrawn from the field, but the State of Kentucky can not be compelled to prove the non-existence of a fact when there is no proof to show the existence of such a fact. The burden certainly is on the plaintiff in this case to prove that property has been under-assessed pursuant to a scheme or agreement among the assessing officers of the State, and if they fail to make such proof their case fails, and as they failed to make such proof the State did not feel that it was necessary to disprove that which had not been proven. The learned District Judge completely destroys his whole opinion on this point when he says that no one claims that there was any scheme or agreement among the assessors or the assessing officers of this State. When he admits that much he admits that his opinion is wrong under the decisions of this court, and having admitted that there was no proof of an agreement or scheme, and having admitted that no one claimed there was any such scheme or agreement, his opinion should have held that he could afford no relief, because, in so holding, he would have been in accord with the decisions of this court and would not have placed himself in the attitude of overruling numerous opinions of the Supreme Court of the United States in order to make good that which he personally believes, that is, that property is uniformly under-assessed in the State of Kentucky.

According to the very nature of things he could not know that property is under-assessed in the State of Kentucky, and he could have no particular knowledge on this question. So far as we have been able to ascertain, the only case involving the question was the old Coulter case, where he took the same position that he takes in the case at bar and where the Supreme Court said his position was not justified. Although he has been a District Judge for many years, and has given faithful attention to the duties of his office, and has made a record of which his people feel proud, yet he leaves the impression in his opinion that he has had time from his duties to investigate the conditions in the one hundred and twenty counties in the State of Kentucky and ascertain that property is uniformly under-assessed. The learned Judge is beside himself on this question. He could not and did not find out these questions from personal investigation. As has been said by this court in some of its opinions, "there is no doubt a natural inclination to think such an under-valuation probable when it is suggested."

When it comes to the payment of taxes it is human nature for everyone to believe that he is paying more than his just proportion, and because he believes that he is paying more than he should pay he naturally thinks that the property of his neighbor is under-assessed. It is true that a District Judge has many questions coming before him which would lead him to believe that property is under-assessed, but a few cases can not determine the matter. The whole people can not be indicted, and the whole people should not be charged with having violated an oath which they take annually, without ample proof to justify the statement that such is the truth.

The District Judge is not sure of his ground and he suggests that it was possible to show to a certainty

that property is under-assessed in this State. We feel sure that if the plaintiff could have shown this to be true beyond all doubt, that the facts would have been adduced, and if the evidence was available and was not produced we have the right to argue that the District Judge is mistaken when he says that the evidence is available, because if available we believe it would have been produced. This is what the learned Judge says on that question:

"Evidence was available, but not presented, which it seems to me would have settled beyond question the truth, not only as to the fact of under-valuation, but as to the true percentage thereof."

He then states how this evidence could have been obtained. His reasoning will be found on pages 140, 141, printed record. If the plan suggested by him had been followed it is true that the court would have known whether property is under-assessed in the State of Kentucky, and we presume that if the evidence was available and the plaintiff had the means of obtaining the evidence and did not bring it forward, it was because the learned District Judge is mistaken in his belief that it would have shown that property is under-assessed in the State of Kentucky. The plaintiff has a great deal at stake in this case. It means millions of dollars to the plaintiff, as well as to the other railroads interested in this litigation, and if by the expenditure of a few thousand dollars they could have shown conclusively that property is under-assessed by the local assessors, and that that under-assessment is pursuant to an agreement, understanding or scheme, they would not have hesitated to have produced the proof. They did not produce the proof, and so far as this record shows they made no effort to do so.

The greatest latitude was given in the obtaining of evidence in this case. The suit was instituted early in 1914, and final decree was entered in June, 1916. More than two years elapsed from the date of making the assessment until the case was finally disposed of in the District Court, and another case involving the same questions had been instituted a year before, so the plaintiff had three years in which to obtain this evidence, which was so easily obtainable, and which, in the opinion of the learned District Judge, would have settled the question conclusively and have settled it in favor of the plaintiff. It can not be argued that the State should have expended the money necessary to acquire this information, because the burden was not upon the State. It can not be argued that the State was derelict in any duty that it owed to the court to show that property is not under-assessed, because that duty was not imposed upon the State unless evidence was produced showing that the allegations in plaintiff's petition on this point are true. While we thought that we might well rest our case upon the opinions of the Supreme Court of the United States that under-assessment meant nothing unless it was pursuant to a scheme or agreement, yet, if the plaintiff and its allies in this litigation had undertaken to have established that property under-assessed in the State wrongfully and illegally, we would have endeavored to show that the contention is without foundation.

To uphold the opinion of the District Judge on this point will be destructive of all governmental functions of the State of Kentucky. It is a serious matter, as we shall seek to show. We do not mean to say that all property is assessed at its fair cash value estimated at the price it would bring at a fair voluntary sale. We know that in many instances property is under-assessed, but we believe that the great body of the citizens of

Kentucky regard the oath which they take, and that they endeavor to assess their property fairly. There is a difference between what we may term assessed value of property, and the ordinary value placed upon property by neighborhood talk. Those who are familiar with the duties of assessing officers in this State, and who understand the proof that is often introduced before assessing officers to show that the assessment of property should not be increased, can readily see that it is an easy thing to reach the conclusion that property is worth more than it really is worth.

It is insisted earnestly that there is a uniform under-assessment of property in the State of Kentucky. If there is a uniform under-assessment, then all the property in the State should be assessed somewhere in the neighborhood of the same percentage of its actual cash value, aside from the plaintiff, who insists that it does not belong to the favored many. The fragmentary, incompetent proof which plaintiff attempts to get into this record shows, if it shows anything for certain, that the property in some of the counties in the State is assessed at a percentage as low as 30 of its real value, while others are assessed at a percentage approaching 90. Where is the uniformity in such assessments as these? If there is a difference of 60 per cent in the assessed value of property between the county lowest assessed and the county highest assessed, it could not be said that there is any uniformity in the assessment of property.

It is insisted that property is intentionally undervalued, and if it is intentionally under-valued why is it that some of the assessing officers of the State assess property as low as 30 per cent while others assess it as high as 90 per cent?

It is argued that it is habitually done, and if it is habitually done why is it that some years the property

in a county is assessed 80 per cent. or 90 per cent. of its value, and other years it is assessed less than 50 per cent. of its value?

It is argued that it is systematically done. If it is systematically done it is done pursuant to some system understood between the various county assessors It does seem that a latitude allowing the property of some counties to be assessed at three times as much as the property in other counties, would show a very bad system.

This is only referring to the counties, and if we take up the individual taxpayers we will find a greater discrepancy. It can not be insisted that all taxpayers in the State are uniformly under-assessed. Certainly many of them are assessed at full fair cash value, while others may escape entirely. Thus we may have a percentage of assessment from zero to 100 per cent. Under conditions such as these, when courts undertake to equalize, with what class are they going to equalize the property of railroads, With the counties that are assessed at 90 per cent. or with the counties that are assessed at 30 per cent? If they take the average assessment and equalize the railroad property with the average assessment, it will be much higher than the assessed value of property in some of the counties and much lower than the assessed value of property in other counties, and it will be much higher than the assessed value of the property of many individuals, and it will be much lower than the assessed value of property of many individuals. It appears that it would be a difficult task to equalize the property of railroads with other property assessed in the State, if there should be an under-assessment as plaintiff claims it has shown. The conditions simply do not exist as plaintiff would have us believe. If we begin the equalizing of property, unless there is a system or a scheme or an agreement that can

be gotten hold of so that the courts may know just what the agreement or scheme is, interminable confusion will result. Every individual who is assessed above the average as found by the court should be reduced to that average, and when all are reduced to that average they will at once insist that their assessment should be placed on par with the man who has assessed his property at the smallest percentage of its value, and eventually, if equality is to be preserved in its purity, all property must be assessed at the same percentage of its value as the person who assessed his property at the smallest percentage of its value. No government can obtain revenues sufficient for governmental expenses under such a system of taxation. Courts can not turn themselves into assessing bodies without destroying the efficiency of any system of taxation.

We have read the opinions of the various courts upon this question, and there is no opinion that so vigorously defends the position of plaintiff as the opinion of the District Judge in this case. His reasoning is clear, as it always is, and is so strong that it is calculated to deceive the very elect, but it is a dangerous opinion. In reading this opinion of the District Judge we are made to exclaim with the Psalmist: "Such knowledge is too wonderful for me; it is high, I can not attain unto it." Revenue and taxation is a practical matter, while the opinion of the District Judge is theoretical, and while he strives for the ideal, he seeks that which can never be attained in matters of revenue and taxation. The idea of the learned District Judge on the assessment of property for taxation is a Utopian dream.

In referring to the Coulter case, the District Judge made this comment:

"I have heretofore noted that Mr. Justice Holmes indicated that he was impressed by the force of my reasoning to the effect that property generally in the State

was uniformly under valued, and that substantially so. But, of course, if there was nothing more here than what was in that case, I could not, in the face of the decision of the Supreme Court in that case, take any such position here. The case in hand is not limited thereto. It contains much more than this in support of that position."

It only requires a superficial examination of the record in the Coulter case to show that this statement in the opinion of the District Judge is based upon an erroneous conclusion. In the Coulter case the railroad dealt extensively in its evidence with the assessed value and real value of property of each county in the State. The entire printed record from page 141 to page 388 is taken up with this character of evidence, and in that case the railroad did obtain the evidence which the District Judge says would have conclusively shown that property is under assessed if the same evidence had been obtained in the instant case.

The reports of the State Board of Equalization were also introduced and cover the entire printed record from pages 389 to 487. Affidavits and depositions were taken tending to show that property was uniformly underassessed. There appears to be nothing in the case at bar that was not in the Coulter case except United States Census returns and the report of the State Tax Commission. The District Judge enumerates the evidence upon which he bases his opinion that property is under assessed, 1: The United States Census report for the year 1910; 2: The report of the State Board of Equalization for the years 1910, 1911, 1912 and 1913; 3: The report of the State Tax Commission of 1913; 4: The testimony of John E. Garner, a member of the State Board of Equalization for the years 1908, 1909, 1910, and 1911; 5: The affidavits of about 190 individuals from 47 counties in different parts of the State; 6: The action of the Board

of Valuation and Assessment in assessing the banking capital of the State; 7: The action of the then Attorney General of the State in filing affidavits from eight counties showing that property was assessed at at least 80% of its value.

I do not think the United States census is competent evidence to show the value of property for purposes of taxation. The census enumerator is not required to ascertain the value of property. The statement as to value of property found in the census report is nothing more than a statement of the individual. It is made for statistical purposes and cannot be classed with statements made under oath by individuals and taxing officers showing the actual cash value of property.

The reports of the State Board of Equalization speak for themselves, and they will be found beginning on page 333, printed record. An examination of the report for 1910 shows that the Board understood that the law required all property to be assessed at its fair cash value. As to what the Board did is shown in that report as follows:

"We selected those counties that most nearly conform to the requirements of the law and endeavored to equalize the others with them. We do not claim that there was a perfect adjustment of values, but a majority of the Board gave a careful investigation and equalized property as nearly as possible with scant evidence and under an imperfect law. The conditions under which we worked were not favorable for accuracy."

If the plaintiff relies upon this report to show an under assessment of property, we fail to see anything in the report that justifies such a conclusion. Some of the counties, as shown by the evidence of the plaintiff, are assessed far above 60% of their value and if the Board took the counties that most nearly met the requirements

of the law it certainly did not equalize property on the basis of 60%. The Board in the 1910 report uses this language:

"We had to contend with slovenness, ignorance and duplicity."

If the mistakes of the assessors in the State are due to slovenness and ignorance they cannot be charged against them. In the report of 1911, beginning on page 335, the Board clearly shows that the reason that they did not make any great increases in the value of property is because the witnesses who appeared before the Board showed that the property should not be increased in the various counties. That would seem to be a good reason for not making an increase. In the 1912 report, page 337, printed record, the Board makes this observation:

"This Board has endeavored at all times to be fair in its deliberations, and has, as far as possible, tried to satisfy the various representatives who have appeared before it to protest against a raise in assessment; yet it has not, at any time, overlooked its duty to the State of Kentucky."

In the 1913 report, page 338, printed record, the Board said:

"We want to compliment the County Judges of Kentucky on the delegations sent before this Board. We found them to be gentlemen. While at all times remembering our duty to the State we have tried to make it pleasant for the gentlemen before us; with a few exceptions, so very few we may call it unanimous, the county delegations before our Board have gone away satisfied, in a good humor, acknowledging that our final action was just to them and the State of Kentucky."

If there is anything in these reports which justifies the opinion of the District Judge that they show a systematic under-assessment of property, a careful analysis of them has failed to disclose anything of the kind to us.

The report of the State Tax Commission made in the year 1913 contains no information as to assessed value and real value of property other than that to be found in the United States census reports from which the report of the said Tax Commission was evidently made up, and it certainly adds nothing to the value of the census reports.

The testimony of John E. Garner which will be found beginning on page 521 of the printed record, contains nothing more than the personal opinion of Mr. Garner, and is out of harmony with the report to the Governor which he signed while he was a member of the State Board of Equalization. He testifies that the Board took the counties least badly assessed and then made the best effort to bring the other counties up to the best assessed counties. His cross examination shows that he did not understand the laws of the State defining the duties of said Board. The affidavits of 190 individuals from 47 counties, is less than 4 affidavits from each county, and an examination of these affidavits which will be found beginning on page 586 of the printed record, will show that the persons making the affidavits only give their personal opinion that property is under-assessed. They do not attempt to point out a single piece of property in the whole State that is underassessed, but make the general statement that property is not assessed at its fair cash value.

The learned District Judge is in error as to a statement that the State Board of Valuation and Assessment assessed banking capital at 80% of its par value. The record does not show that such an assessment was made,

and as a matter of fact, the Board assessed banking capital at 80% of the face value of capital stock, surplus and undivided profits, which is a very different thing from 80% of par value. The Board did this upon the idea that 80% of the value of capital stock, surplus and undivided profits, was the fair cash value of the property, estimated at the price it would bring at a fair voluntary sale. There is no bank that does not have some bad paper in it, and the Board was of the opinion that it would probably take 20% of the capital stock, surplus and undivided profits of any bank to take care of bad debts, and uncollectable assets of the bank.

It is true that the then Attorney General of the State filed affidavits from eight counties showing that the property in these eight counties was assessed at 80% of its fair cash value, but this does not show that such is true. It is only the opinion of a few persons that property is not assessed at its fair cash value. An analysis of the evidence relied upon by the learned District Judge shows that it affords no reason for his belief that property is uniformly, systematically, intentionally and habitually under-assessed, but, as said before, if such was true, unless such under-assessment was pursuant to a scheme or agreement between the assessing authorities in the State of Kentucky, it would amount to nothing.

As against the flimsy evidence upon which the learned District Judge based his opinion, we have the other side of the case, which is not given any consideration in the opinion.

Let us summarize the evidence against the conclusions of the learned District Judge. To begin with, the individual taxapayer, is required to take an oath before he answers the questions propounded to him by the assessor, which questions are furnished by the Auditor of the State in accordance with the provisions of the

statutes. This oath requires the taxpayer to swear that he will give in his property for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. After he has answered the questions propounded to him by the assessor, he is required to subscribe to another oath, in which he swears that he has given in his property at its fair cash value, estimated at the price it would bring at a fair voluntary sale.

We have in the State of Kentucky approximately 750,000 taxpayers and a sworn statement of each of these 750,000 witnesses must be thrown into the discard before a court can reach the conclusion reached by the learned District Judge. There is not a line of evidence in the record which shows that the individual taxpayers do not take the oaths required to be taken by the statutes of the State. Each taxpayer then must be convicted of false swearing, if we are to believe the flimsy evidence offered by the plaintiff to show that the property is not assessed at its fair cash value.

After the 750,000 individual taxpayers comes the 120 county assessors and approximately 700 deputy county assessors. The laws of the State makes it the duty of each county assessor to take the constitutional oath of office that he will faithfully perform the duties of his office. In addition to this he is required to specifically swear that he will not assess any property, knowingly, at less than its fair cash value, estimated at the price it would bring at a fair voluntary sale. Each deputy assessor is required to take the same oath. After the county assessor has completed his work, before he can receive the compensation which the law allows him, he and each deputy must go before the county court and subscribe to another oath in which each of them must swear that they have performed their duties in accordance with the provisions of the law, and that they have not assessed property, unknowingly, for less than its fair

cash value, estimated at the price it would bring at a fair voluntary sale.

This gives us 800 additional witnesses who have sworn that property is assessed at its fair cash value, and not only have they sworn it once, but they have been required to swear that they would so assess the property before they made the assessment and again after the assessment was made they have been required to swear that the property was so assessed.

Next come the county Boards of Supervisors. The county judge is required to appoint not less than five in each county, and they must take an oath in which they swear that they will see that property is assessed and equalized for taxation in accordance with the provisions of the law. There are more than 700 of these men, and the law requires the county judge to appoint intelligent men. They go over each individual list in the county, and determine whether the property of the individual taxpayer has been assessed at its fair cash value. They not only do this once, but they do it each year, and the county judge is required to appoint a new Board of Supervisors each year. If they intentionally fail to perform their duty and the county judge continues to appoint men who fail to perform their duty, then the county judge is *particeps criminis* to the crime of false swearing and we have 120 county judges in the State. It is the duty of the county attorney to advise the County Board of Supervisors, and if he permits them to violate their oath of office, naturally the county attorney becomes *particeps criminis* to the crime of false swearing. There is no evidence that the County Board of Supervisors have failed to take the oath required by law. This is not all After the County Boards of Supervisors have completed their work, it is forwarded to the State Board of Equalization. The State Board of Equalization consists of seven members, one from each Appellate District in

the State, with the Auditor of Public Accounts as chairman. The members of this board are appointed by the Governor.

The members of the Board take oath that they will discharge their duties in accordance with the provisions of the law. There is nothing in this record which shows that the Board does not always take that oath, and if they violate the law knowingly and the Governor continues to appoint Boards which violate the law when the opportunity is given them, the Governor is false to his oath of office and becomes a party to the fraud.

To repeat, we have the evidence of the individual taxpayer doubly sworn; the evidence of the various county assessors and their deputies doubly sworn; the evidence of the County Board of Supervisors and the evidence of the State Board of Equalization, showing that the conclusion reached by the learned District Judge is not sound.

To convict all of the citizens of the State of Kentucky of false swearing, there should be required something more than the Federal census report or the affidavits of a few individual citizens in the county through which the railroads run. It should require more than reports of State Boards of Equalization or Taxing Commission.

It is a serious thing to charge the citizens of the State of Kentucky with being actuated by fraudulent motives in giving in their property for taxation. If it be true that evidence can be produced to show that this state of affairs exists, certainly such evidence ought to be produced in a way which shows clearly and unmistakably that the condition of affairs which the District Judge assumes to exist, does in reality exist.

If it be true that the taxpayers are not sworn before and after giving their lists, such evidence should be produced. If it be true that the assessors and their depu-

ties do not take the oath required by law, this could be shown. If it be true that the County Courts fraudulently and falsely approve the claims of the county assessor, or that the Auditor of Public Accounts falsely and fraudulently pay the claims of county assessors without their being required to take the oath which the statutes require they shall take before receiving their compensation, the fact could be easily proven.

We submit that the officers of the State have done their duty, and certainly when there is no proof to the contrary, it is conclusively presumed they have done their duty, but they can not be condemned by evidence other than that which is positive and direct, and there is no such evidence in this record. But the learned District Judge says that he may take judicial knowledge of the fact that property is under-assessed in the State of Kentucky and that the officers do not perform duties imposed upon them. The question of whether a court can take judicial knowledge of the under-assessment of property was discussed in the case of New York vs. Barker, 179 U. S., 279.

PLAINTIFF HAS AN ADEQUATE REMEDY AT LAW.

We shall not discuss this phase of the case as it has been thoroughly covered in the brief of Louisville Railway Company vs. Green and Louisville and Interurban Railway Company vs. Green. It is well settled in this State that if any tax payer pays taxes when no taxes are due, that the Auditor under the provisions of Section 162, Kentucky Statutes, may draw his warrant for the amount so improperly paid, and the Court of Appeals has held in a number of cases that where the Auditor declines to draw his warrant, a suit may be instituted to compel him to perform this duty. Section 162, Kentucky Statutes, is as follows:

"When it shall appear to the Auditor that money has been paid into the treasury for taxes when no such taxes were in fact due, he shall issue his warrant on the treasury for such money so improperly paid, in behalf of the person who paid the same. Nothing herein contained shall authorize the issuing of any such warrant in favor of any person who may have made payment of the revenue tax due on any tract of land, unless it is manifest that the whole of the tax due the Commonwealth on such land has been paid, independent of the mistaken payment, and ought to be reimbursed."

The latest case construing this section is the Louisville Gas & Electric Company vs. Bosworth, Auditor, 169 Ky., 824. In that case the appellant had paid what is known in the laws of Kentucky, as an organization tax to the State. It is insisted that it had paid a greater amount than it was required to pay under the provisions of the law. The Auditor refused to draw his warrant for the amount claimed to be due, and the appellant instituted suit against him to compel him to refund so much of the money as was improperly paid. After discussing the merits of the controversy, the court thus stated the law:

"The general rule which applies to the payment of money for taxes, which are not due, is that, if voluntarily paid, they cannot be recovered. They are deemed to be voluntarily paid when they can be recovered only by an action in a court and when the delinquent has an opportunity for his day in court. The rule is, that when the collecting officer may distrain for the taxes and they are paid, the payment is not deemed to be voluntary. City of Louisville vs. Anderson, 79 Ky., 335; L. & N. R. R. Co. vs. Hopkins Co., 87 Ky., 612; German Security Bank vs. Coulter, 112 Ky., 577: Louisville City National Bank vs. Coulter, 112 Ky., 584."

It seems to us that the plaintiff in this action may have paid to the Treasurer, the taxes due the State of

Kentucky, and then may have instituted suit to recover the amount of taxes so paid which it deems to be illegal. If this method of procedure had been followed, plaintiff would have had no action to seek injunctive relief against the collection of the tax. No injury would have been done plaintiff, if it had followed this method instead of the method which it pursued.

In the late case of Johnson vs. Wells Fargo & Co., 239 U. S., 234, this court in discussing this question, said:

"The contention is made that there was no ground for equity jurisdiction, and that therefore, the bill should have been dismissed. This court has frequently held that a bill will not lie in the Federal Courts to enjoin the collection of State taxes where a plain, adequate and complete remedy at law has been given to recover back illegal taxes and the attack upon the assessment is based upon the sole ground that the same is illegal and void. See Singer Sewing Machine Company vs. Benedict, 229 U. S., 481, where many of the previous cases in this court are reviewed. But in the present case, it was alleged not only that the assessment was unwarranted by the law, but that the manner of making the assessment amounted to fraud upon the constitutional rights of the express companies, or such gross mistakes as would amount to fraud, thus averring a distinct and well recognized ground of equity jurisdiction."

The State has provided a remedy for just such cases as the one which the plaintiff attempts to assert against the State. The tax payer must pay his taxes and if he considers himself aggrieved he may have his day in court by instituting suit to recover back the amount which he deems illegal.

We do not think this is the only adequate remedy which plaintiff has under the laws of Kentucky, as is fully shown in the brief above referred to. The State

Board of Equalization has the power to increase the assessed value of property which has been assessed by the local county assessors to its fair cash value. The plaintiff may have instituted suit against this Board to compel it to bring the property assessed by the local assessors up to the standard at which plaintiff's property was assessed. As said by the Court of Appeals of Kentucky in case of Evansville, Henderson and Nashville Railroad Company vs. Commonwealth, 72 Ky., 439:

"Again, the constitutionality of the tax is questioned on the ground of inequality, because it appears that other railroads in the State, particularly the Louisville & Nashville and the Louisville, Cincinnati & Lexington Railroads, are of greater value per mile than the road of the appellant. But waiving other reasons for rejecting this argument, which might be sustained on the authority of numerous decisions, we deem it sufficient to say that while the evidence shows the other railroads mentioned and their property to be worth more than twenty thousand dollars per mile, and therefore, discloses a reason for increasing the assessment of those roads, it wholly fails to prove that the appellant's road is not of the value of twenty thousand dollars per mile."

We say with the Court of Appeals that if it be true that the property of individual tax payers is under-assessed, that affords a reason why the assessment of such property should be increased, and as long as the plaintiff had a remedy to compel the increase in the assessment of such property, which was equally available with the remedy to enjoin the assessment against its property, it should have chosen the remedy which was for the best interest of the State, and which would have resulted in doing justice in accordance with the plain provisions of the Constitution and laws of the State of Kentucky.

CONCLUSION.

The Attorney General feels that this case has not been briefed as thoroughly for the State as the importance of the question requires. The brief in the Illinois Central cases and the brief in the Louisville Railway and Louisville & Interurban Railway cases have been prepared with more care, and as the questions involved are common to all the cases, we ask that the briefs filed be considered in each of the cases.

We have reduced the points in this case to four, which may be briefly summarized as followed:

1. Does the Federal Court have jurisdiction?

2. Is the action of the State Board of Valuation and Assessment final? In the event it did not place a greater valuation upon the property of plaintiff in Kentucky than the actual value, or if it did place a greater valuation, was such valuation reached by reason of fraud on the part of the members of the Board, or the following of a fundamentally wrong principle in making the assessment?

3. Is it a violation of the provisions of the Fourteenth Amendment to assess the property of plaintiff at a greater percentage of its fair cash value than the local county assessors uniformly assess property in the counties?

4. Does plaintiff have an adequate remedy at law?

The first point is not material, as the case is here on its merits, and besides, it seems from a careful consideration of all the cases that it is most probable that the Federal Courts do have jurisdiction of cases of this character.

We think the court must conclude that the State Board of Valuation and Assessment did not fix a greater value upon plaintiff's property in the State of Kentucky than its actual value, and that the findings of the Board that plaintiff's property in the State of Ken-

tucky for taxation for the year 1913 was $75,159,402, must stand.

While the second point is the main question for determination, in a sense, the vital point is the third. The case reduces itself in the last analysis to the sole question of whether the learned District Judge was correct in equalizing the assessed value of plaintiff's property with the assessed value of other property in the State on the basis that other property in the State is assessed at 60 per cent. of its actual cash value.

The fourth point ought to be available in the Louisville Railway case and the Louisville & Interurban case, as there is nothing alleged in those cases other than the illegality of the tax, but it is exceedingly doubtful whether this point can be made available in the L. & N. case, or the I. C. cases, other than in so far as it applies to the taxes due the State of Kentucky. If this is held to be a suit against the State, so far as the taxes due Kentucky are concerned, the question of whether there is an adequate remedy at law is not material other than in showing that plaintiff cannot be damaged if the court should hold that this is a suit against the State.

If the State loses on the third point it loses all that it is here contending for, and the decree of the District Judge should be affirmed, but we insist that the case should be reversed on the cross-appeal, and that the judgment of the State Board of Valuation and Assessment should be permitted to stand.

Respectfully submitted,

Marvel Mills Logan
Attorney General.

CHARLES H. MORRIS,
Assistant Attorney General.

JOHN L. RICH,
CHARLES CARROLL,
Attorneys for State Board.

APPENDIX A.

SECTIONS OF THE CONSTITUTION OF KENTUCKY REFERRED TO IN BRIEF.

§ 171. **Levy and collection of by general laws—uniformity.** The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws. (See Sec. 4019, Ky. Stats.)

§ 172. **Assessment—how value fixed—penalty.** All property, not exempted from taxation by this Constitution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any willful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law. (See Sec. 4043, Ky. Stat.)

§ 174. **Corporate, to be taxed like individual property—incomes—licenses—franchises.** All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by this Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises. (See further as to license and franchise tax, Sec. 181.)

§ 182. **Railroads—assessment of.** Nothing in this Constitution shall be construed to prevent the General Assembly from providing, by law, how railroads and railroad property shall be assessed and how taxes thereon shall be collected. And, until otherwise provided, the present law on said subject shall remain in force. (See Sec. 4096, Ky. Stats.)

§ 227. **Officers liable to indictment for misfeasance or neglect—appeal.** Judges of the County Court, Justices of the Peace, Sheriffs, Coroners, Surveyors, Jailers, Assessors, County Attorneys and Constables shall be subject to indictment or prosecution for misfeasance or malfeasance in office, or willful neglect in discharge of official duties, in such mode as may be prescribed by law; and upon conviction his office shall become vacant, but such officer shall have the right to appeal to the Court of Appeals. (See Sec. 3748, Ky. Stat. and Con., Sec. 68.)

§ 228. **Oath to be taken by all officers—form of.** Members of the General Assembly and all officers, before they enter upon the execution of the duties of their respective offices, and all members of the bar, before they enter upon the practice of their profession, shall take the following oath or affirmation: I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States and the Constitution of this Commonwealth, and be faithful and true to the Commonwealth of Kentucky so long as I continue a citizen thereof, and that I will faithfully execute, to the best of my ability, the office of ..... according to law; and I do further solemnly swear (or affirm) that since the adoption of the present Constitution, I, being a citizen of this State, have not fought a duel with deadly weapons within this State, nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending, so help me God.

SECTIONS OF THE KENTUCKY STATUTES REFERRED TO IN BRIEF.

§ 4020. (2) **Property subject—tangible and intangible property—franchises.** All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the same be in or out of the State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as herein provided, shall be subject to taxation unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale: Provided, however: That tangible personal property located and having a taxable situs without the State, of persons residing in this State, and of all corporations organized under the laws of this State, shall not be subject to taxation: And, provided further, That the situs of intangible personal property for purposes of taxation shall be at the residence of the real or beneficial owner, and not at the residence of the fiduciary or agent having the custody or possession of same. Provided further, That nothing herein contained shall in any way affect the liability for franchise taxes now payable by corporations organized under the laws of this State. (Section as amended by act March, 1908, p. 121.)

§ 4044. (2) **Oath, assessor, deputies shall take.** The assessor and his deputies, before they enter upon the duties of the office, shall, in addition to the oath prescribed by the Constitution, take the following oath: "I do swear that I will administer to every person listing property of any description the oath prescribed by law, and fix the value of all property to be listed by me at its fair cash value, estimated at the price it would bring at a fair voluntary sale, without favor or partiality; and I will diligently search and inquire so that no person shall be

passed over, or shall fail to have an opportunity to give a list of his taxable property, and that I will truly report all persons who shall fail or refuse to list their taxable property, after being duly called on by me for that purpose, or who have given in a false or fraudulent list, so help me, God."

§ 4045. (3) **Bond of assessor—action on.** The assessor shall at the same time execute bond to the Commonwealth, with good surety, to be approved by the county court, for the faithful discharge of the duties of his office, which bond shall be filed in the office of, and kept safely by, the clerk of the county court, and on which the assessor and his sureties shall be liable for any violation of the duties of his office, by himself or any of his deputies. Action may be instituted on it by the Commonwealth or any person aggrieved, and recovery had thereon, from time to time, to the extent of the injury sustained.

§ 4047. (5) **Oath to taxpayer—assessor may correct list.** The assessor or his deputies shall read and administer to every person listing property the following oath: "You swear that the list of taxable property about to be given by you will contain a full and complete list, and the best description you can give, of all and every species of property belonging to you or in your possession, subject to taxation on the first day of September last, including all money, notes, bonds or other evidence of debts except bonds not taxable, and stock incorporations whose property and franchise have been listed by the corporation, and that, according to your best judgment, you will value your property at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and that you will true and perfect answers make to all questions that may be asked you concerning your taxable property, or that of others in your possession, or about to be listed by you for them." If, in the opinion of the assessor or deputy, there be any error in any list, it shall be his duty to note same on his tax books so as to call the attention of the board of supervisors thereto.

§ 4051. (9) **False statement or device to escape taxation—penalty.** If any person shall willfully make a false statement, or, for the purpose of avoiding taxation, make a temporary investment in securities exempt by law from taxation, or convert any intangible property into non-taxable property outside of this State, or resort to any device whatever for the purpose of avoiding taxation, he shall be deemed guilty of a misdemeanor, and, on conviction, fined any sum not exceeding five hundred dollars, and be subect to three times the amount of tax upon his estate, to be recovered by the sheriff by action in the name of the Commonwealth in the county in which the estate is liable for taxation, or by the auditor, when the taxes are payable to him, in the Franklin circuit or quarterly court.

§ 4053. (13) **Assessor to fix value upon all estate listed with him—report to supervisors.** The assessor, from his knowledge, and from the statement of the person listing the property for taxation, and such

other evidence as he may be able to obtain upon oath of witnesses sworn by him, shall fix the value upon all the estate listed with him for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale, and enter the same in his tax book, in the proper name and title of things, together with the Christian and surname of the person, and other information designated in the form of the tax book prescribed by law, giving also the aggregate value of the property assessed, and, in estimating the value of lands, the increased value, on account of all improvements thereon, shall be taken into consideration. If the value fixed by the assessor be greater than that fixed by the taxpayer it shall be the duty of the assessor to notify the taxpayer at the time of the assessment the amount of such increase and of the time and place of the meeting of the board of supervisors. The assessor shall report to the board of supervisors a list of all taxpayers in the county whose tax lists have been added to or increased by him after receiving them from the hands of the taxpayer, together with a short statement.

§ 4058. (18) **Books and blanks—oath to taxpayer.** Before the first day of September of each year, the Auditor of Public Accounts shall deliver to each county clerk of this State, for the use of the assessor and their deputies, a sufficient number of assessment books and necessary blank schedules for the assessment of all property, real and personal, with interrogatories to be propounded to each person, with affidavit thereto attached, to be signed and sworn to by the party whose property is assessed. The schedule shall contain two columns. In one the person whose property is assessed shall fix the values. In the other, the assessor shall fix what, in his judgment, is the proper valuation of the property. The party or the assessor where the party can not write shall write the word "none" after each item when he has no property to assess as named in each item; but no item shall be passed without being answered. The following shall be the form of interrogatories and schedules as hereinafter required:

Interrogatories propounded to and answered by ..... of ..... county, ... State of Kentucky, on the ..... day of ....., and schedule of all property held or owned by him on the first day of September, 190...., and the valuation thereof as fixed by him and as fixed by the assessor.

Interrogatories.

No. 1. Are you or were you, on the first day of September of the present year, executor of the will or administrator or curator of the estate of any deceased person, or guardian, committee or assignee, commissioner, receiver or trustee of any person, or have in your possession or under your control any property, money or other thing of value belonging to any other person or corporation? Answer ..... If the answer is "Yes," the person is required to list such

property separate from his own, and in the name of the real owner, and show by whom listed.

No. 2. Have you, before the first day of September of the present year, either personally or through the agency of another, caused any part of your taxable money or other property to be temporarily converted, either by sale, exchange, or any other manner, into any bonds, money or securities not taxable, and any other property not taxable under the laws of this State for the purpose of evading the payment of taxes, or have you resorted to any means or device whatever to evade the payment of taxes on any part of the property owned by you during the twelve months next preceding the first day of September of the present year? Answer ..... If the answer is "Yes," the person shall state all the facts connected with such transaction, and the assessor shall reduce such statement to writing and attach it to the schedule and make a note of the facts in his book, that the attention of the supervisors may be called thereto.

SCHEDULE.

No. of Item	DESCRIPTION OF PROPERTY	Value Fixed by the Person Assessed	Value Fixed by the Assessor
1.	Amount of bonds, number and denomination of bonds and value thereof	$	$
2.	Amount of notes secured by mortgage	$	$
3.	Amount of other notes	$	$
4.	Amount of accounts	$	$
5.	Amount of cash on hand	$	$
6.	Amount of cash on deposit in bank, and against which checks in payment of prior bona fide indebtedness have not been drawn	$	$
7.	Amount of cash on deposit with other corporations	$	$
8.	Amount of cash on deposit with individuals	$	$
9.	Amount of all other credits or money at interest	$	$
10.	Amount of stock in corporations, joint stock companies or associations of this State not paid on by the company or association	$	$
11.	Amount of stock in foreign corporations not exempt by law	$	$
12.	Number of acres of land and price per acre	$	$
13.	Nearest residence thereto	$	$
14.	Election precinct in which situated	$	$
15.	Valuation of each tract with improvements	$	$
16.	Number of city or town lots	$	$
17.	Name of town or city where located	$	$
18.	Value of each with improvements	$	$

19. Number of thoroughbred, saddle and standard stallions	$	$
20. Value	$	$
21. Number of thoroughbred, saddle and standard geldings	$	$
22. Value	$	$
23. Number of thoroughbred, saddle and standard mares and colts	$	$
24. Value	$	$
25. Number of stallions of common stock	$	$
26. Value	$	$
27. Number of geldings, mares and colts of common stock	$	$
28. Value	$	$
29. Number of mules and mule colts	$	$
30. Value	$	$
31. Number of jacks	$	$
32. Value	$	$
33. Number of jennets	$	$
34. Value	$	$
35. Number of registered bulls	$	$
36. Value	$	$
37. Number of registered cows and calves	$	$
38. Value	$	$
39. Number of bulls, cows, calves and steers of common stock	$	$
40. Value	$	$
41. Number of sheep	$	$
42. Value	$	$
43. Number of hogs	$	$
44. Value	$	$
45. Value of agricultural implements	$	$
46. Value of agricultural products	$	$
47. Less value of the crops grown in the year assessment was made and in the hands of the producer	$	$
48. Value of agricultural products for taxation	$	$
49. Number of wagons, carriages, automobiles, bicycles and vehicles of every kind and the value of each separately	$	$
50. Value of slaughtered animals	$	$
51. Value of safes	$	$
52. Value of household and kitchen furniture	$	$
53. Value of manufacturing implements, machinery of all kinds	$	$

54. Value of pianoforte and other musical instruments .....$ $
55. Value of raw materials to be used in manufacturing .....$ $
56. Value of manufactured articles.....$ $
57. Number of paintings, and value thereof.....$ $
58. Library—number of volumes—value thereof.....$ $
59. Number of diamonds, value thereof.....$ $
60. Value of watches and clocks.....$ $
61. Value of jewelry.....$ $
62. Value of gold, silver and plated ware.....$ $
63. Value of steam engines, including boilers.....$ $
64. Number of steamboats, sail boats or other water crafts or any interest therein—value....$ $
65. Value of mineral products.....$ $
66. Value of coal mines, oil, gas and salt wells.....$ $
67. Value of patent rights.....$ $
68. Present value of annuities and royalties.....$ $
69. Value of brick, stone and other building materials .....$ $
70. Value of wines, whiskies, brandies and mixtures thereof not in distillery bonded warehouses .....$ $
71. Number of stores—value of stock of goods and other property therein.....$ $
72. Value of property held for another for the purpose of sale on commission or otherwise..$ $

Miscellany.

73. Value of all property not mentioned above.....$ $
74. Total value of property listed as above.....$ $
75. Less household goods and other personal property of persons with a family, to be deducted from valuation of personal property listed above, not to exceed two hundred and fifty dollars in value .....$ $
76. Balance of taxation.....$ $
77. Males over twenty-one years of age
78. Legal voters. Served in Federal or Confederate army—full name.
79. Enrolled militia.
80. Children between six and twenty years.
81. Number of studs, jacks and bulls for which a service fee was charged.
82. Rate per season.

The following questions are required to be answered for statistical purposes:

83. Pounds of tobacco raised during the year.
84. Pounds of hemp raised during the year.

85. Tons of hay raised during the year.
86. Bushels of corn raised during the year.
87. Bushels of wheat raised during the year.
88. Bushels of oats raised during the year.
89. Bushels of barley raised during the year.
90. Bushels of grass seed and clover seed raised during the year.
91. Tons of coal mined during the year.
92. Tons of pig metal mined during the year.
93. Tons of bloom.
94. Tons of bar iron.
95. Number of acres of wheat raised during the year.
96. Number of acres of corn raised during the year.
97. Number of acres of meadow.
98. Number of acres of woodland.
99. Number of acres of tobacco.
100. Number of dogs over four months of age and description of same.

The following shall be the form of oath which shall be painted on each schedule, which the party whose list is taken shall subscribe and swear to before the assessor or his deputy as soon as such schedule shall be completed; and all persons failing or refusing to take such oath shall be deemed guilty of refusing to give in their property for assessment, and be fined as provided for such offenses.

State of Kentucky,

..... County,

Scilicet.

I do solemnly swear (or affirm) that the foregoing schedule contains a true, full and complete list of all taxable property belonging to me on the first day of September, 19....., and, to the best of my knowledge, belief and judgment, the values fixed by me to the various articles as above, is the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and that to the best of my knowledge, belief and judgment, none of said articles would bring any greater sum at any such sale, than as stated above, and that I can not realize any greater sum on the notes and accounts owned and held by me against others than as stated by me in said schedule, and that the answers made by me to the above interrogatories are true.

.....

Subscribed and sworn to before me by ..... this ..... day of ....., after said oath was read to him by me.

....., Assessor.

It shall be the duty of every assessor or deputy to read said oath in full to each taxpayer and to see that no item has been passed unanswered before he shall be allowed to sign or swear to it. Any assessor or deputy who shall violate either of these provisions shall be deemed

guilty of a misdemeanor and, on conviction, be fined fifty dollars for each offense, and any person who shall make a false statement as to any matter with reference to the listing of his property for taxation shall be deemed guilty of false swearing and, on conviction, shall be punished accordingly.

§ 4076. (36) **Penalty for wrongfully listing land.** That any assessor who shall list any of said land in violation of this act shall be guilty of a misdemeanor, and fined not exceeding two hundred dollars for each offense.

§ 4076a. (37) **Penalty for failure of duty by assessor.** The assessor shall, for any failure of his duty under this law, where no other penalty is provided, be fined in any sum not less than twenty-five dollars nor more than fifty dollars.

§ 4115. (1) **County judge to appoint—number.** The county judge, except in counties having a city therein of the first, second, third or fourth class, shall, at the November term of each court, appoint five intelligent, discreet housekeepers and owners of real estate residing in different portions of the county and in counties having a city therein of the first or second class he shall appoint three additional persons in such city and from different wards thereof; and in counties having a city therein of the third or fourth class, he shall appoint two additional persons from each city and from different wards thereof, who shall constitute the board of supervisors of tax in their respective counties.

§ 4117. (3) **Oath supervisors shall take.** The supervisors, before they enter upon the discharge of their duties, shall take the following oath: "You swear that you will, to the best of your ability, discharge the duties required of you as supervisor of tax, and that, in each instance where the property has not been assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale, you will increase or decrease the value and fix the value at what you believe the property would bring at a fair voluntary sale."

§ 4120. (6) **Duty and powers of supervisors.** The board of supervisors shall make a careful examination of the assessor's books, and each individual list thereof, and may increase or decrease any list; but the board shall not reduce or raise any assessment unless the evidence be clear and unmistakable that the valuation is not a fair cash value, and shall list all property omitted by the assessor which may be subject to taxation in the county, and shall correct any errors of the assessor; and in cases where the property has not been correctly valued, they shall fix the value thereof, and correct the assessor's books, so as to show the true value of the property, as herein provided; but should any property escape assessment by the assessors or supervisors, in whole or in part, it may be assessed as provided in section 3, article 15 (4241).

§ 4268. (1) **Appointment—number—term—qualifications—quorum.**

It shall be the duty of the Governor to annually appoint one person for each appellate district of this State, and they, together with the Auditor of Public Accounts, who shall be an ex-officio member without additional compensation, shall constitute a State Board of Equalization and Assessment. No person shall be eligible to appointment on the board by the Governor who is under thirty years old, and he shall be a housekeeper and shall be the owner in fee of real estate located in this State. The members of this board shall hold office for a period of one year, and until their successors are appointed and qualified. The term of office of said persons to be appointed as aforesaid shall begin on the first day of January, one thousand nine hundred and three, and annually thereafter. It shall require five members of said board present to constitute a quorum: Provided, That all seven of the members of said board to be appointed under the provisions of this act on the first day of January, 1908, shall be appointed as follows:. Three of same to serve for only two years, and their successors shall be appointed to serve for four years, and the remaining four members appointed on January first, 1908, shall be appointed to serve for four years, and their successors shall be appointed to serve for a period of four years; and all members of said board appointed after 1908 shall serve for a term of four years; and said board shall complete its labors not later than the first day of June in each year.

§ 4269. (2) **Oath of office.** Each member of said board, before entering upon the duties of said office, shall take the oath or affirmation prescribed by the Constitution of the State.

§ 4274. (7) **Percentage of values fixed—notice to county judges—hearing witnesses.** The said board of equalization shall fix the percentage of assessed value of real property at its fair cash value, and all counties whose average lists of real property fall below such value shall be raised to the same, and all those counties whose average lists are above the same, shall be lowered to said cash value. The secretary to the State Board of Equalization shall report to the various county judges of this Commonwealth, as soon as possible, the action of the board in regard to their respective counties, whereupon said judges may, in their discretion, each appoint not exceeding five witnesses to appear under oath before said board in reference to the action of the board. The board shall then revise their action or not, as they may think just and proper. Said witnesses must appear in a reasonable time, or they shall lose their right to be heard. The compensation and expenses of said witnesses, if any, shall be paid by their respective county courts.

§ 4275. (8) **Personal property.** The said board of equalization shall also equalize the personal property of every county in this Commonwealth by adding to or subtracting from the list of personal property, as the case may be, the same per centum as was added to or subtracted from the list of farm lands for the same county, and for this

purpose the average per centum of assessed value to cash value of farm lands shall be used, and in determining such per centum, fractions less than one-half shall be rejected, and fractions of one-half or over shall be counted as one.

§ 4096. (1) To report to auditor—penalty for failure. That the president or chief officer of each railroad company, or other corporation owning or operating a railroad line, in whole or in part, in this State, and all railroad bridge companies owning or operating the bridge spanning a river constituting the boundary of this State shall, on or before the first of August in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, incorporated town and taxing district therein, together with the average value per mile thereof, and in the respective counties, cities, incorporated towns and taxing districts therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities and incorporated towns in which the same are located. That if any of said railroad companies own or operate a railroad or railroads out of this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State. Said report shall be made as of the first day of July, and a failure to file said report by the first day of August shall subject the president or chief officer residing in this State to a fine of one thousand dollars, and fifty dollars for every day after the first day of August that he fails to file said report, to be recovered as indicated by section 9 (4104) of this article.

§ 4098. (3) Railroad commission to equalize. The auditor shall lay before the railroad commission, on or before the fifteenth day of August, the returns made to him under this act, and any schedules and valuations he may have made under sections 1 and 2 (4096 and 4097), of this article. And should the valuations, or any of them, in the judgment of said board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting, and the said board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose.

§ 4077. (1) Franchise—assessment of. Every railway company or

corporation, and guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town or taxing district, where its franchise may be exercised. The Auditor, Treasurer and Secretary of State are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 1 (4095) of subdivision 4 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require. It shall be the duty of the Attorney General, when requested by the board of valuation and assessment, to attend said board at its meetings and advise with same in its proceedings.

§ 4078. (2) **Corporations to report to auditor to determine value of franchise.** In order to determine the value of the franchises mentioned in the next preceding section, shall, annually, between the thirtieth day of June and the first day of October, make and deliver to the Auditor of Public Accounts of this State a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the Auditor may prescribe, showing the following facts, viz: the name and principal place of business of the corporation, company or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the thirtieth day of June of the year in which the statement is required to be made; the amount of surplus funds and undivided profits and the value of all other assets; the total amount of indebtedness as principal, the amount of gross or net earnings or income, including interest on investments, and incomes from all other sources for twelve months next preceding the thirtieth day of June of the year in which the statement is required; the amount and kind of tangible property in this State, and where situated, as-

sessed, or liable to assessment in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale, and such other facts as the Auditor may require.

§ 4079. (3) Value of franchise—how determined—lines extend beyond State or county. Where the line or lines of any such corporation, company or association extend beyond the limits of the State or county, the statement shall, in addition to the other facts hereinbefore required, show the length of entire lines operated, owned, leased or controlled in this State and in each county, incorporated city, town or taxing district, and the entire line operated, controlled, leased or owned elsewhere. If the corporation, company or association be organized under the laws of any other State or government or organized and incorporated in this State, but operating and conducting its business in other States as well as in this State, the statement shall show the following facts in addition to the facts hereinbefore required: Th gross and net income or earnings received in this State and out of this State, on business done in this State, and the entire gross receipts of the corporation, company or association in this State and elsewhere during the twelve months next before the thirtieth day of June of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchise to be taxed, the said board may excuse the officer from answering such questions: Provided, That said board, from said statement, and from such other evidence as it may have, if such corporation, company or association be organized under the laws of this State, shall fix the value of the capital stock of the corporation, company or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid.

§ 4080. (4) Foreign corporations—franchise—how determined. If the corporation, company or association be organized under the laws of any other State or government, except as provided in the next section the board shall fix the capital stock in this State by capitalizing the net income derived in this State, or it shall fix the capital stock as hereinbefore provided, and will determine from the amount of the gross receipts of such corporation, company or association in this State and elsewhere, the proportion which the gross receipts of this State, within twelve months next before the thirtieth day of June of the year in which the assessments were made, bears to the entire gross receipts of the company, the same proportion of the value of the entire capital stock or the capitalizing of the net earnings in this State, less the assessed value of the tangible property assessed, or liable to assessment in this State, shall be the correct value of the corporate

franchise of such corporation, company or association for taxation in this State.

§ 4081. (5) **Interstate carrier—franchise—how fixed.** If the corporation organized under the laws of this State, or of some other State government, be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair-car company or a corporation performing any other public service, the lines of which extend beyond the limits of the State, the said board will fix the value of the capital stock as hereinbefore provided, and that portion of the value of the capital stock which the length of the lines operated, owned, leased, or controlled in this State, bears to the total length of the lines owned, leased or controlled in this State and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this State; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through or into which such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or district bears to the whole length of lines in this State; but if any such railroad or other corporation organized under the laws of this State have all of its lines outside of this State, the said board shall fix the value of its entire capital stock as hereinbefore provided, and apportion to this State for taxation therein the proper proportion and not less than one per cent of its said capital stock, and the amount so apportioned shall be the value of its intangible property, including its corporate franchise, stocks, bonds, securities and choses in action, subject to taxation in this State and in the county, city, town and district where its principal place of business in this State may be located.

§ 4082. (6) **Persons engaged in certain business, how valued for taxation.** Whenever any person or association of persons not being a corporation, nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein shall be deemed and treated as the capital stock of such person or association of persons for the purpose of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation.

§ 4083. (7) **Auditor to notify corporation of values.** It shall be the duty of the Auditor, immediately after fixing such values by said board, to notify the corporation of the fact; and all such corporations shall have thirty days from the time of receiving the notice to go before such board and ask a change of the valuation, and may introduce evidence, and the chairman of the board is hereby authorized to summons and swear witnesses and, after hearing such evidence, the board may change the valuation as it may deem proper, and the action of the board shall be final.

§ 4084. (8) Auditor to certify to county clerk. The auditor shall, at the expiration of thirty days after the final determination of such values, certify to the county clerk of the counties, when any portion of the corporate franchise of any such corporation, company or association shall be liable to local taxation as herein provided, the amount thereof liable for county, city, town or district tax, and such certificate shall be by each county clerk filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection, and all county, city, municipal, school and other taxes shall be due and payable thirty days after the notice of the amount of such tax is given by the officer whose duty it is to collect the same.

§ 4086. (10) Pay taxes into State treasury. All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all taxes due the State from them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided.

§ 4090. (14) Corporation failing to report—board to fix values. Should any corporation fail to make the reports as required herein on or before the first day of October of each year, the said board shall proceed to ascertain the facts and values as required by this article, in such manner and by such means as it deems proper, at the cost of the company failing to make the report, and shall fix the value of the corporate franchise liable for taxation as aforesaid and the corporation shall be taxed accordingly.

§ 4091. (15) Taxes when due—penalties—clerks to furnish statement of value of tangible property. All the State taxes assessed against any corporation, company or association, under this article, shall be due and payable thirty days after notice of the same has been given said corporation, company or association by the Auditor; and all county, municipal, school and other taxes shall be due and payable thirty days after notice of the amount of said tax is given by the officer whose duty it is to collect the same; and every such corporation, company or association failing to pay its taxes, after receiving thirty days' notice, shall be deemed delinquent, and a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum. Any such corporation, company or association failing to pay its taxes, penalty and interest, after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction, shall be fined fifty dollars for each day the same remains unpaid, to be recovered by indictment or civil action, of which the Franklin circuit court shall have jurisdiction. It shall be the duty of the county clerk to furnish to the Auditor of Public Accounts, on blanks provided by the Auditor, a statement of the

assessed value of the tangible property of all corporations, companies or associations paying a franchise or other tax under this act.

Any county clerk failing to comply with the requirements of this act shall be guilty of a misdemeanor and, on conviction, shall be fined not less than ten nor more than twenty-five dollars.